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AN  
ESSAY  
IN A COURSE OF LECTURES  
ON  
***ABSTRACTS OF TITLE;***  
TO FACILITATE THE STUDY,  
AND THE APPLICATION  
OF THE FIRST PRINCIPLES,  
AND  
GENERAL RULES  
OF THE  
**LAWS OF PROPERTY;**



STATING IN DETAIL,

*The Duty of Solicitors in preparing, &c. and of Counsel  
advising, on Abstracts of Title.*

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By RICHARD PRESTON, Esq.  
BARRISTER AT LAW.

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VOL. I.

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1818.

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TO  
THE RIGHT HONOURABLE  
JOHN LORD ELDON,  
BARON ELDON, OF ELDON  
IN THE  
COUNTY OF DURHAM;  
LORD HIGH CHANCELLOR  
OF THE  
UNITED KINGDOM,

THIS WORK, designed to assist the rising generation in the study of the Principles and general Rules of the Law of Titles to real Property, and the Practice of the Chamber Counsel, IS PRESENTED; as a sincere though humble tribute of esteem for the profound knowledge of Principle and Practice for which his Lordship is so pre-eminently distinguished; and for the zeal with which he has uniformly inculcated the importance and the necessity, even to the Counsel practising at the Bar of his Lordship's Court, of an intimate acquaintance with these rules and principles, as the best and most genuine foundation of Legal Knowledge; by

*RICHARD PRESTON.*



## TO THE READER.

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THE Work now offered to the Profession originated, and was, in a great measure, completed, in a Course of *Lectures* to Pupils.

The Lectures were delivered without any previous arrangement of the subject, or collection of authorities, and without the most distant intention of publication.

These observations are offered as an apology for the want of a more complete and systematic arrangement of the subject.

That a large number of copies are in existence, all of them containing inaccuracies committed in dictating the lectures, and many of them containing the errors and omissions of transcribers, are among the motives for offering the work to the Public with priority over the Essay on Estates, &c.

The object in view dictated the order of the parts, and each head was discussed briefly, or in a more extended manner, as *the duty* of communicating useful information to the pupils seemed to require. The different parts of the



work will, on this account, be found very unequal in extent of information.

To have discussed every head fully would have extended the work to an inconvenient size. Instead of an Elementary Book, a diffuse Treatise would have been produced. The object was to give an outline, not to fill it up ; and to enlarge on those heads only which are most useful in practice, and on which least information, in a connected series of observations, is to be found in other works.

Pupils in succession have uniformly declared, and by their improvement have evinced, that this work has aided their studies more than any other book which has been put into their hands.

It taught them that practical knowledge, and gave them that facility of analysis, and those results of experience, embodied in writing, which, unfortunately for the Profession, are generally allowed to die with the possessor ; or which, if verbally delivered, without being committed to writing, are retained imperfectly, and do not admit of examination, when their accuracy is to be brought to the test of practice.

To instruct the solicitor in the mode of preparing his abstracts, and assist him in selecting its materials, is not the only object of this work. It aims at the higher and more

important end of inculcating First Principles; of giving the rules, and teaching the reasons on which the practice is founded. The reader is elicited, by easy transitions, from the most simple propositions into the more abstruse rules of Law. That labor which would deter any student who must collect the materials for himself, from the pursuit of recondite and difficult points, is, it is hoped, rendered, by inductions, and gradual preparation, so simple and so easy, that the present work may be well used, as it is intended to be, as a *manual* or *grammar* of the Rules of Law respecting Titles.

Among his own Pupils, at least, this work has answered the design of the Author far beyond his expectation; and he has had ample experience of its utility.

When it is considered that an Abstract is one of the first acts on which a young man is required to employ his talents, or exercise his industry, and that no one can prepare a draft from the deeds or other documents of a title, without first abstracting, or selecting and combining, the several parts, arranging them on paper, or on his mind, it will be obvious, that any guide to assist him in this undertaking must, if it teach him the best, or even in the absence of better assistance, a good mode of performing his task, be of great utility.

To carry the Student into a knowledge of the grounds and rudiments of Law, by teaching him, step by step, the Principles and the Reasons of the Practice; and to lead him, while learning to prepare his abstract, into the more nice and difficult branches of the Profession, was deemed an object justifying the labor of the undertaking, and the still more arduous work of publication.

It is fully intended, and finally arranged, that this work should be completed in three volumes.

It consists of one hundred Lectures, delivered in as many hours; each Lecture having occupied one hour. The reader may therefore, by the devotion of one hour in each of one hundred successive days, attain with ease the knowledge to be acquired from the perusal of this work. But though the work was dictated in one hundred hours, its revision, its correction, and the reference to authorities, have occupied a much larger portion of time.

Great anxiety has been felt to render the work as accurate as circumstances would admit. But in a work of this nature, depending so materially on conclusions formed in practice, and often on an attempt to collect and reconcile the jarring and discordant opinions of Practitioners, and the fluctuating opinions of successive Judges, it would be the height of

presumption and absurdity to expect to be free from error, or to escape from just criticism.

Were positive exemption from error required from authors, how few works would be proper for the eye of the Public! The work is as correct as the Author could make it, consistently with his other pursuits; and he has availed himself of every opportunity of detecting and correcting the errors into which he had fallen.

Many of the propositions depend on practice and opinion, and are not to be relied on with confidence, but to be received with caution. When authorities are given, they are intended rather as the medium for further research, than as the foundation of the proposition to which they are attached.

In directing the studies of the reader, the author has given a reference to works of merit with every attention to justice and professional utility. He has referred to his own productions oftener than has been pleasant to his feelings; and he has referred to them only because they most fully express the doctrines which he wished to inculcate; and because the present work often fills up the chasm left in the preceding works; or because he wished to avoid repetition, and to render the several publications parts of one and the same system.

The reader will observe that the Author has bestowed most labor on those parts which are connected with his first Essay. Thus titles, under Tenants in Tail, and for Life, are meant to be supplements to the Essay on the Quantity of Estates, rendering that work more extensively useful in practice.

On the other hand, as the productions of the Author's earliest studies were principally employed in collecting or in framing the rules of construction, and collecting the authorities under which estates in fee and in tail, and for life and for years, are created, the observations on these topics, will, in the present work, be very concise. Utility has been the Author's object. His principal motive for the publication is to assist the studies of others; to supply to those who from their circumstances in life cannot become pupils in a regular course of reading, some of those advantages which are to be derived from a scientific course of study, under the direction of those who devote a portion of their time to this rational and useful mode of assisting young men to become qualified to practise with honor and credit to themselves, and security and advantage to the Public.

To the Writer of these observations it is a pleasing reflection, that his Pupils have been a source of great comfort, satisfaction, and

improvement to himself. In instructing them he has greatly extended the sphere of his own knowledge. The ardor and animation excited in communicating instruction to them have produced most of those works which the Profession have had, or are likely to have, from the Author.

Without the duty of communicating information to others, he would never have embodied into writing either the present Essay, or the three volumes already published of the Treatise on the Practice of Conveyancing. Such as these works are they are given to the Profession, as the means of assisting the studies of others, rather than as perfect works; as the foundation for future and more extensive research, than as complete treatises.

To candid and liberal communications, suggesting errors, or questioning the accuracy of any of the propositions, the author will pay every deference and attention. He will be more ready to correct any errors, (and he is prepared to expect that there are many,) than to persist in them.

In the third volume, an index to the cases, and to the principal points, and a table of errata, &c. will be added.

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ON THE  
**LAWS OF PROPERTY**

AS APPLICABLE TO  
*ABSTRACTS OF TITLE.*

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ON TITLES.

**W**HEN land, or other property, which does not pass by mere delivery, but is held by a title, depending on documental evidence, is sold, it is the duty of the *solicitor* for the vendor to prepare an abstract of the title ; and of the solicitor for the purchaser to compare the abstract with the deeds, wills, &c., and to call for evidence of the facts which are stated as relevant to the title ; and to take care that the abstract contains a correct and faithful statement of all circumstances disclosed by the deeds, wills, &c., or depending on extraneous facts, as *marriages, burials, baptisms, possession, descents, disseisins*, and the like, and which are material to the title.

The general practice is to produce the deeds, &c. to the purchaser's solicitor, at the office of

the vendor's solicitor. But wherever the documents of title are, the purchaser must procure some person on his behalf, to compare the abstract with the evidence of title.

When the abstract is thus prepared, and if necessary, corrected, it is generally submitted to the conveyancer or counsel. Few solicitors take on themselves the heavy responsibility of advising on a title, if implicated with any nicety, or giving occasion to any question of difficulty.

Indeed it is a subject of surprise that more titles, accepted under the advice of solicitors, do not prove defective, when the most experienced and skilful conveyancers, and learned practitioners, have such arduous duties to perform.

No one can comprehend the labour which a conveyancer must undergo, unless he has had actual experience or observation of the difficulties to which he is exposed, of collecting and combining facts, expounding intention, and applying abstruse rules of law.

The conveyancer, of all the other lawyers, is in a situation to be most severely oppressed by labour and by difficulty; and ought to be as learned, perhaps considering his duties, more learned in the law, than the members who are engaged in any of the other departments of the profession.

It is his province to consider the title, to advise on the abstract; to point out the defects,

if any, which exist in the evidence of the title, and the doubts which arise on the construction or the sufficiency of any of the deeds or wills, or the doubts in which the law, as it applies to the facts, or the language of the instruments of title, is involved; also the means by which these defects may be supplied, or those doubts may be removed; also on the mode of conveyance proper to be adopted in order to complete a title in the purchaser.

The observations to be made respecting the *form* of abstracts, and even the commencement of the evidence of title, may with propriety be extended to transactions between *mortgagor* and *mortgagee*; though the conveyancer will be governed in his conclusions by some rules applicable to vendors and purchasers which do not apply with equal force to *mortgagors* and *mortgagees*.

In treating of abstracts of title it will be proper to consider,

1st, The circumstances necessary to be regarded in preparing the abstract, and the cautions to be observed in comparing the abstract with the title deeds, &c.

2dly, The points to which attention is, in a more especial manner, to be paid, in considering and advising on the state of the title.

Under the first head are to be discussed,

1st, *The commencement of the evidence of the title, in other words, the time from which the abstract of title should take its commencement.*

2dly, *The form* in which the abstract should appear ; and

3dly, The circumstances which should be stated in explanation of the abstract.

In general a *head or title is given to the abstract*. It should be so far full and explicit as to show whose title is to be considered ; and what is the general description or class of property to which the attention of the person who is to peruse the abstract, is to be directed.

Few things are more distressing than to wade through a long abstract ; to combine its parts, select the distinctions which different parts require ; and in the sequel to discover that nine tenth parts of the labour which has been employed has been useless, and has distracted the mind to no purpose.

On long abstracts it would be useful to give a list of the dates of the deeds in chronological order, and to show by proper references the pages in which the material deeds, wills, &c. are to be found.

An arrangement of dates artfully made, may lead to great difficulties, and sometimes to very erroneous conclusions.

If a summary or abridgement of the title were also added, so as to give a general review of the substance of the title, the facility of perusing the abstract would be increased. Such summary, however, should never be attempted, except by a person who can rely on his skill to give the contents with accuracy. A wrong

COMMENCEMENT OF ABSTRACT. 5

impression once communicated, is not easily effaced ; and may mislead, especially those who are liable to various interruptions during the perusal of a long abstract.

All these topics will be more fully discussed under the proper heads.

1st, *Of the time from which the abstract of title should take its commencement.*

THE general practice is to take the commencement of the title, so as to show the state of the evidence for a period of *sixty years* at least ; and as often as circumstances will permit this should be done.

In many cases it is material to carry back the title even to a more remote period.

This is particularly important when the *first* deed in the abstract is a recovery deed, or some other deed founded on a prior instrument, as an appointment, &c. in execution of a power ; and also in the case of advowsons ; and of heirs deriving their descents from a remote ancestor, as the first purchaser ; also in titles derived under grants from the crown, &c. &c. but even in the instance of grants from the crown, a vendor is not under an obligation to show the intermediate deeds, &c. between the grant, and that period at which, by the ordinary rules of practice, the evidence of his title would commence.

So when a *settlement* is made *in pursuance of articles*, great anxiety is properly displayed, to

obtain an inspection of the articles themselves, that the purchaser may be satisfied that the settlement is a due performance of the articles ; and this anxiety increases in proportion as there is reason to suspect that a larger interest has been obtained under the settlement, by the parents, or one of them, than the articles warranted ; or when the settlement manifestly betrays the absence of professional skill in preparing the limitations of the settlement. Also when an *appointment* is made in exercise of a *power*, there is a like desire to have an abstract of the deed which created the power ; more especially if there be not any recital, or there is a very short and, apparently, defective recital of the power. And when the seller's solicitor does not state in the abstract, the deed containing the *power* under which the appointment was made, or the deed or will by which the intail was created, the purchaser's solicitor or counsel should, by every means, endeavour to trace the commencement of the title to its source, by ascertaining the creation of the estate tail, or the power ; and as often as there is ground to suspect concealment, or suppression of material deeds, &c. a bill should be filed in equity for a discovery of the deeds ; or, if a suit be depending, the production of the deeds may be enforced under the usual order, that the vendor shall produce all deeds on oath, &c.

Interrogatories may also be exhibited in the master's office, for the discovery of deeds, &c.

on showing a ground, which raises a suspicion of suppression or concealment.

By established practice, it is no longer an objection to a title under a *recovery deed* made upwards of sixty years since, that the creation of the estate tail cannot, in point of fact, be shown.

And although it be the safe and correct practice, that a person who is tenant in tail with reversion or remainder in fee by descent, should suffer a common recovery, that the title may be independent of the reversion or remainder in fee, and consequently of the charges affecting that estate, yet without showing some existing encumbrance, it is not an available objection, that the title depends on a fine with proclamations, by which the estate tail has been barred, and the ownership under the estate tail merged in the remainder or reversion, so that the charges and encumbrances, if any, affecting the reversion or remainder would be accelerated.

In general appointments contain a full recital of the power under which they are made; and recovery deeds contain a history of the creation of the estate tail; and this recital is, in reference to ancient deeds, generally, and by experienced men, treated as satisfactory on the point of the existence of the power, and of the creation of the intail, and of the mode in which the power was to be executed, and the circumstances and ceremonies which were to attend the execution.



But *inaccuracies* in a deed or will, betraying the want of professional knowledge in the person preparing the instrument, lead to an inquiry for an inspection of the deed containing the power, &c. &c.

The habit which prevails among conveyancers of inquiring for the deed or will, by which the estate tail is created, renders it prudent in most cases in preparing recovery deeds, to show the creation of the estate tail, and the existence of the right to suffer a recovery.

There are cases, however, in which it would, in preparing such a deed, &c. be injudicious to disclose the creation of the estate tail.

This observation applies, when it is doubtful, whether the party is tenant for life, or in tail; or when the disclosure of the intail would lead to other information, which it is better to keep out of view.

The creation of the power under which an appointment is made should also be shown in every deed, or will, operating as an appointment; and the circumstances required to the valid exercise of the power should be stated, as far as they are material to the operation of the deed, or will, made in exercise of the power.

When the power is in perplexed language, the power should be recited *totidem verbis*.

But in cases in which it is doubtful whether the power would be a good root or foundation

for a title, it is, in preparing deeds, expedient to pass over the power without any recital thereof, or reference to, any power in particular.

Also, when the title depends on a *settlement* made in favor of a *wife as tenant in tail*, the state of the prior title should be shown, that it may appear, as often as it can be material to the subsequent deduction of the title, whether the wife is the settlor, or she took an estate tail, *ex provisione viri*.

This however is material only when the title would otherwise, *apparently*, depend on some act done by the wife alone, *while sole*, or with a second husband, for the purpose of barring the intail; and which would be ineffectual, in consequence of the statute of Henry VII. if she had been tenant of an estate tail, *ex provisione viri*.

*Prima facie* lands settled by the husband and wife by fine, are considered as the inheritance of the wife.

This presumption however cannot be relied on by the conveyancer, when the fact can be ascertained.

Also, as often as an abstract commences with a settlement, made in pursuance of *articles*, or under a *trust*, the articles, especially if entered into, and executed previous to the marriage; or the *deed creating the trust*; should be abstracted as far as they are material; and if they are omitted by the vendor's solicitor out of the abstract, this omission should be supplied, as far as it shall be

feasible, at the instance of the solicitor for the purchaser.

And if the articles or deed creating the trust cannot be found, the *recitals* of the articles, and of the trusts on which the settlement is founded, should be stated fully, as far as they are introduced into the settlement, and are material to the title.

After acquiescence in the settlement for a long series of years, recitals are frequently deemed sufficient evidence of the contents of the articles.

But if, as sometimes happens, the settlement is made *in pursuance* of the articles or trusts, and merely with reference to them, without stating the particulars of the articles, or the trusts, on which the settlement is founded, the conveyancer will be driven to the necessity of considering whether the settlement is such as the nature of the case seems to have required. And in settlements made in pursuance of marriage articles, as often as the words, "Heirs of the body" are used in the settlement, as words of limitation to give an estate tail to both or one of the parents, especially the husband, this difficulty presents itself with great force, since it is likely that this expression was used in the articles or trusts, as words of purchase descriptive of the children of the marriage.

On settlements made in pursuance of articles a very useful note, for which the author is indebted to the friendship of Mr. Watkins, when living, will be added in its proper place.

Also, as often as a title is for a *term of years*, the creation of the term should be shown from the original deed or will, if it be in existence; or if the deed creating the term be lost, the creation of the term should be stated from the recitals, as found in the more ancient deeds; and there should be a rigid adherence to the language of such recital.

A title has oftentimes been treated as defective, because the deed creating the term could not be found; but it has always appeared to the writer of these observations, that a title depending on a term for years created at a distant period, may be good, notwithstanding the loss of the deed creating the term.

The following observations present themselves on this point:

Though it be true, that the deed creating a term is material to the title, and is the evidence on which a purchaser can best rely, yet a title under a very long term of years, which has been created for sixty years at least, appears to be marketable without evidence of the creation of the term, since against all persons, except the lessor, or those who claim the reversion or remainder under him, *the recitals* are evidence of the state of the title; and the lessor, or those who claim under him, cannot by any means, after sixty years, recover the lands without proof of an actual seisin within that period. To show the seisin, they must adduce evidence of the

tenancy; and, in adducing such evidence, unless in very particular circumstances, (as where a rent is reserved,) they must support the title under the term; and in several instances, titles have been approved by gentlemen of distinguished eminence, although there was not any evidence of the creation of the term except by recital. Mr. Booth treated the want of an original lease creating a term even of a modern date, as a ground only for caution, and not as an absolute defect of title. And though the recital is not evidence as a recital, yet the recital with possession under it, and agreeable to the same, would be admitted as evidence, for the same reason that, for want of other evidence, an *ancient* abstract, a copy, &c. would be admitted.

An abstract of title to leasehold property should commence with the original lease, and all subsequent assignments should, in general, be abstracted.

It should contain the like evidence of deaths, payment of charges, &c. as an abstract of the title to a freehold estate.

Where the estate is a leasehold for years, and has been recently and specifically bequeathed, and the legatee is the vendor, without the concurrence of the executors, proof must be given of the assent of the executors to the bequest.

Where the estate passes by a will, or letters of administration, it must be shown that the will was proved in, or that the administration was granted by, the prerogative or other court,

having jurisdiction over the place in which the lands are situate.

In preparing abstracts of title *to leasehold property under building leases*, or beneficial leases for short terms of years, the evidence of the title generally commences with the indenture of lease by which the term was created.

But as to titles depending on *building leases*, the practice has for a long time been to require the production of evidence of the title of the person by whom the lease was granted.

And if the *lease* was made *under a power* or a *trust*, it was always the practice to require that the *power* or the *trust* should be abstracted, as the means of showing that the lease was warranted by the power or the trust.

It was formerly a point on which there existed a difference of opinion, whether the purchaser of the benefit of a lease could require an abstract of the title of the lessor.

In modern practice the right is generally precluded by one of the articles of sale.

The question of right can arise only in the absence of stipulation.

It has recently been decided, that a person who *contracts for a lease*, to be made by a person who holds under a *leaseholder*, has a right to an abstract, disclosing the title of the freeholder by whom the original lease was granted.

This is in principle a decision, that the person who contracts for a leasehold interest is, in the absence of stipulation, entitled to know the state

of the freehold title out of which the lease is derived.

So where there was a contract for the sale of an existing and a reversionary lease, specific performance was withheld for want of the production of the title of the lessors.—*Deverall v. Lord Bolton*, 18 Vesey 505.

Lessors are become very cautious how they produce the evidence of their title ; and unless they have covenanted to produce the deeds, there does not appear to be any means to compel them, otherwise than as between litigating parties in a court of law by means of a subpoena *duces tecum*, &c.

In the case of leases by *Hospitals, Bishops, Ecclesiastical Persons, and Ecclesiastical Corporations*, &c. who have an unalienable estate as to the inheritance, and who have a particular power of leasing under Acts of Parliament ; and also as to *corporations* (such as the *city of London*) who have notoriously been the owners for a long series of years ; the invariable practice is not to require any evidence of title beyond that of the lessee.

But leases from these ecclesiastical bodies and other corporations, and even individuals, are frequently obtained under a *tenant right* ; namely, a favour to the former tenant, as a continuance or an enlargement of his interest.

As to leases under enabling statutes, care should be taken to see that the former leases have been duly surrendered by the persons who,

in point of estate, were competent to make the surrender, and that the lease does, in all its circumstances, pursue the power under which it was made.

In order to see that the former leases were duly surrendered, the legal title is to be traced without any regard to the equitable ownership. Many titles are defective in this particular. Indeed few will bear strict investigation. When they are good, it is more from chance or the lapse of time, than from caution. Suppose there are three leases in succession for forty years on different renewals made by different deans, &c. The second lease might be granted without a surrender, actual or virtual, before the first lease was expired, and before the commencement of the last year of that lease. Thus this lease would not be good under the statute of Henry VIII. since it was not either surrendered or expired within one year: and the third lease might be granted after the expiration of the first lease, but during the second lease. The third lease, without a surrender of the second lease, would be good only on the ground that the second lease was or had become void.

On this point some observations will be found in that part of these notes which shows the duty of the conveyancer.

Leases of this description are frequently the subject of settlements, and the renewals are obtained under that preference to the former tenants, which in courts of equity is denominated



the *tenant right* ; and as often as the lease is obtained under a tenant right, the state of the title should be shown during the last sixty years, so that it may appear that the title is good *in equity*, as well as at law, and not affected by any trust founded on the tenant right.

At least the purchaser must trace the title through each successive owner, as far as he has notice of any trust.

Any reference to former settlements by means of a surrender, or through the existing lease, will lead to an inquiry, and be constructive notice of all encumbrances falling within the scope of the inquiry suggested by this notice.

It would greatly relieve titles of this description that the new lease should be made altogether independently of, and without any reference to, the title under the former leases.

Of course the surrender of the former leases should not form a part of the express consideration of the new lease.

As often as it may be practicable, the abstract of title to freehold lands should commence with the deeds of conveyance to a person who was the first purchaser.

Such conveyance would afford a strong presumption that the title was considered good at that time; and that the person by whom the conveyance was made was the absolute owner in fee simple. And possession for the last sixty years under that conveyance, renders the presumption in favour of the title so strong, that

no one ever thinks it necessary to inquire for further evidence, except under particular circumstances, as rumour of a threatened claim, or actual knowledge from other deeds that there is a latent defect of the title.

And it frequently occurs to conveyancers in extensive practice, to know that the title, as represented by the abstract, does not disclose all the material information which ought to be stated: and though they will not, unless a fraud be practising, give any intimation of their knowledge, they will be firm in pressing for further evidence.

When the title cannot be taken up with a purchase deed, the next best instrument on which to found its commencement, is a will, or some settlement, made by a person acting as the absolute owner of the fee simple. This document, with possession, consistent with the evidence of the title, furnishes the like presumption of a good title. And the presumption is greatly strengthened, if there has been a frequent change of ownership, without any adverse claim.

When a vendor has very ancient deeds, there is frequently a difficulty on the part of his solicitor in deciding whether all the deeds should be abstracted.

To abstract all the deeds is, in many cases, to invite tedious inquiries and long discussions, which would answer no useful purpose to the purchaser. A discretion ought to be exercised on this point.

No substantial defect in the title ought to be concealed by withholding the knowledge of the deeds, which may give a different complexion to the title.

On the other hand, it cannot be expected that on mere matters of form, a vendor should furnish the means of enabling a reluctant or over cautious purchaser, or those professional men who are more nice than wise, to treat the title as difficult or doubtful ; when no one, acting with a sound discretion, would view it as attended with either difficulty or doubt.

It must not however be forgotten, that many titles which are by the abstract, made to appear as if they were good and free from all questions, are, in point of law, defective, if the facts which the title involves were fully disclosed ; since there may be dormant titles under old intails, remainders, &c. On the other hand, by a suppression of material deeds, the heir of a family has frequently been able to show a title in himself as the rightful or absolute owner, while he had only a limited interest as a base fee, or he was not the heir to the first purchaser.

Suppose, for instance, a man seised *ex parte maternâ*, to have made a settlement at the distance of sixty years, and to have limited the ultimate use to his right heirs ; the limitation in favour of his right heirs would be his *old use* ; and the fee would have been descendible to his heirs on the part of the maternal ancestor, the first purchaser.

COMMENCEMENT OF ABSTRACT. 19

Collecting the title from the settlement, without knowledge of the descent, the settler would be treated as seised in fee as the first purchaser, and consequently a title derived under the *paternal heir* could not be questioned without knowing the state of the title in the settler; while the title really would be in the maternal heir.

So if a will or other instrument, dated at the distance of about sixty years, and constituting the root of the title, give all the messuages, &c. *purchased* of a particular person; it is usual, if practicable, to show the purchase deeds, to make out the application of the language of the deed or will to the parcels.

However, *enjoyment for* sixty years under the gift in the deed or will, would be presumptive evidence, sufficient to render the title marketable, since possession would prove *prima facie*, that the lands thus held were derived under this purchase.

Other like cases may call for a like extension of the evidence of the title; more especially when the deeds, &c. are applicable to a *reversionary* interest, and the same has never fallen into possession, or has fallen into possession within a recent period.

And the knowledge and fullest experience that suppressions take place, and that titles are manufactured, to make them subservient to the interests of the parties, conveyancers frequently incur the imputation of making inquiries which

are deemed irrelevant, while these inquiries are suggested by the experience they have derived from practice.

Sometimes the first deed in the abstract is of a date falling within the period of sixty years : But the history of the title is traced through a period of that duration, by showing, either from the *recitals*, or from a detail of the title in the description of the parcels, or from the assessments to the land tax, &c., that the ownership on which the title depends, commenced upwards of sixty years since ; and this, in general, is deemed satisfactory ; especially after an inquiry for wills, settlements, &c. as far as that inquiry can reasonably be prosecuted.

Different circumstances however impose the necessity of different degrees of caution.

That a large estate has been subdivided among many purchasers, at the distance of thirty or forty years, removes the suspicion of concealment ; and accounts, in the most satisfactory manner, for the absence of the more early deeds.

The general rule is to take up the commencement of the title from a period of sixty years, or from the last purchase deed, or the last settlement prior to that period.

But the purchaser has a right, if he think fit, to require that the abstract should state all the deeds, wills, &c. in the possession or power of the seller ; and, as may be collected from a former observation, there are many instances

in which a title appearing regular during the period of sixty years, would assume a very different complexion, and furnish a very different conclusion if it were investigated for a further period.

The case which gave rise to *Goodright v. Forrester*\*, particularly illustrates this proposition: and it is observable, that though *sixty years possession*, under a seisin in fee, is a bar to the remedy by a *writ of right*, a title may, in point of law, remain defective after a period however indefinite. For instance, if successive estates tail be created, with remainder in fee, the title may, under fines and nonclaim, or the statutes of limitation, be good as against one or more of the tenants in tail, and be defective as to the more remote estates.

For each tenant in tail and his issue, and also the owner of the remainder or reversion in fee, will be allowed a period of twenty years from the determination of the prior estate for the purpose of asserting his title; and if the right *first* commence in an infant, married woman, person beyond the sea, non compos, or in prison, each person labouring under such disabilities, and being the person to whom the right first accrues, will have a further period of ten years to make his claim. See the statute 21 James I, cap. 16, § 2.

These observations, as they refer to *time*, apply to a case in which no fine with proclamations,

\* 1 Taunton, p. 585.

capable of operation under the statutes of non-claim, has been levied ; for when a fine with proclamations has been levied, the claim must be made within five years from the time when the right accrues, or the time at which the disabilities cease.

Hence, in a case involving the common mistake of levying a fine, when a common recovery was the proper and only available assurance, the title becomes involved in great difficulty, and at least requires many, and in some instances, very expensive inquiries and investigation, to prove a title to the entire fee simple: and in many instances no title can be obtained to more than a base or determinable fee ; or, at least, the title to any greater interest cannot be relied on as clearly acquired : or if there be a fee simple in the vendor, his title to that estate commenced under a *discontinuance*, or a *disseisin*, and has left, in other persons, rights or titles of entry or of action not yet effectually or indisputably barred.

Also when a title is derived *by descent* through successive ancestors, it is sometimes (as may be collected from a former observation) necessary to go back for a period exceeding sixty years for the purpose of ascertaining the first purchaser ; since the descent may be materially varied, in this respect, by the actual, when compared with the presumable, state of the title. Indeed, a vendor, deriving his title under or through a *maternal ancestor*, cannot

make out the evidence of that title, without showing seisin in the maternal ancestor.

The like observations apply to instances in which there are not any title deeds whatever.

In a case of this sort the title depended on successive descents. An objection was taken to the title on the ground that there were mere descents and no deeds.

It was the better opinion, that the want of deeds did not afford any objection to the title; but the conveyancers who were consulted would not be satisfied with the title as strictly marketable. They advised that the seller ought to make an abatement of one third part of the purchase money, on account of the risk to which the title was exposed; and the difficulty which would attend the same when carried to market: and such abatement was made accordingly.

In a subsequent case, a gentleman who was the purchaser, resisted specific performance, on the ground that the title rested merely on possession, without any deeds carrying on the evidence of title. A suit was instituted in Chancery. The report and the decision were in favour of the title, and specific performance was decreed against the purchaser.

Were the rule different, a title depending on successive descents through many generations, would be the worst of titles to carry to market, while in intendment of law it is deemed the safest of titles.



When the land lies in a *register county* the title is relieved from difficulties of this nature : and this is one of the many advantages to a vendor attending the registry of deeds in counties which have a register : for as no will, settlement, &c. would have appeared on the register, the purchaser's suspicions would not have arisen, nor could his objections have been sustained ; since a deed or will not registered is not binding *at law* against a *purchaser with or without notice* : and even in equity is not of any avail against a purchaser *for a valuable consideration*, without notice. To the purchaser there is the further advantage from a register, that he obtains a clue to all deeds, wills, &c. affecting the property.

Great however as are the advantages of a register in some cases, yet the advantages are more than counterbalanced by the inconveniences to which they give rise ; from the difficulty of investigating titles, or of answering the doubts which a register often suggests ; thus leading to useless and inconvenient researches.

In the instance of the purchase *without any title deeds*, various precautions were taken to guard against the possibility of latent intails and other encumbrances. A common recovery was suffered by the vendor, with a view to bar his estate tail, if any, and all remainders expectant on the same. A *feoffment* was made by him and his brothers and sisters, and a fine levied with proclamations by them and the

vendor, for the purpose of establishing the title through the medium of the statutes of nonclaim on fines, and to bar dormant intails not within the scope and operation of the recovery. The deeds also stated by recitals the reason of these several assurances ; avering that there were not any settlements or wills in the knowledge of any of the parties.

There was also a separate conveyance by lease and release from the vendor to the purchaser, with covenants for the title generally, as against all persons.

As often as there is an *attendant term*, which was created upwards of sixty years since, the abstract ought to state the deed or will creating the term : and it is the practice, though this practice is attended with a heavy expense, and certainly is in many cases very unjustifiable, to deduce the title through the intermediate period.

No part of practice stands more in need of reform, than that which calls for such an expenditure.

If a title under the term for years be shown during a period of thirty or forty years, how can any defect in the title to the term well exist? The only instance of such defect which has ever occurred, is when the term vested in a person who is dead, and no representation to that person has been made out ; so that there has been a dormant title without an adverse possession.

Generally speaking, the courts will presume the existence and the regularity of mesne assignments. [2 Black. Reports, 1228.]

Frequently the original deed creating the term is not in the custody of the present owner of the property which is sold. Under these circumstances the creation of the term does, in general, appear for the first time from the recital in some subsequent deed.

With a view however to the arrangement of the evidence of the title, and rendering the same more simple and intelligible, and also to display the skill of the person by whom the abstract is prepared, it would be more correct to state the creation of the term in the order of its date, and in this mode, viz. ; *1st April, 1700, It appears in the recital of the deed of the day of afterwards abstracted, that, &c.* [here show the creation of the term].

Afterwards, in abstracting the deed which contains the recital, it will be sufficient to refer to that recital in these or the like terms :

*After reciting the Indenture of the 1st day of April 1700, already noticed p. by which the term of years was created, &c.*

This observation is equally applicable to the deduction of the title in its subsequent stages. Some further observations on this head will be offered in considering the subject of the arrangements proper to be made in abstracting the evidence of the title.

When the earliest deeds of which the vendor

has the possession are dated within the period of sixty years, and he relies on the *possession of some ancestor*, or of the testator himself, or of a former owner, as completing the evidence of the seisin for a period of sixty years, there should be an abstract of the leases, if any can be found, which were granted by such former owner; or for want of leases, it should be shown that the supposed owner was assessed to the land tax for these lands; or some other evidence, as recitals, stewards accounts of rents, old maps, local histories, old abstracts, cases submitted to counsel, and the like, should be produced to raise the presumption of ownership: and when estates have been *sold in parcels*, inquiry should be made for the more ancient evidences of the title, among the different persons who are the present owners of other parts of the property held under the same title.

In many instances the title has been traced to a proper source by this species of investigation. And even though the original deeds may not be found, the chances are, that in the progress of this inquiry, some authentic copies, or other evidence of the more early deeds, will be discovered in the custody of some or one of the owners of the other property held under the same title.

*Deeds* and even *wills*, are sometimes found in the hands of those who represent the stewards, or the law agents of the family of the former owners, or of the gentlemen who have succeeded to the professional concerns of such law agents, &c.

It would tend greatly to public convenience by facilitating such researches ; and be a profitable appointment to any individual, that all deeds, wills, &c. left or found in the hands of persons who have no connection with the property, or with the owners, or a table of their dates, and the names of the parties, and the description of the parcels, should be deposited in some public office. The existence of such office would quickly give it abundance of employment.

The *covenant for the production of title deeds* also frequently throws some light on the state of the early title, and leads to the discovery of the deeds themselves.

On the other hand, as these covenants are constructive notice of encumbrances, and, after a long interval, lead to an inquiry for deeds, &c. which have been converted into dust or ashes, the safe practice is, and it is the general practice in modern times, to take the covenant in a separate instrument ; and cases exist in which it is prudent to take several deeds of covenant for the production of the evidence of title ; each deed containing a different series ; so that one of the covenants may be given over to a future purchaser, without any notice of deeds, which had better, even for the sake of such purchaser, be kept out of view.

When an *estate is sold in parcels*, and the deeds do not accompany the title to the lands which are sold ; and even in other cases, it is frequently prudent, in preparing title deeds, to

show the commencement of the title of the vendor, with the intention, in the event of the loss of the title deeds, of supplying that loss by affording reasonable evidence, or in some cases, presumption only, of their operation and effect.

This is done either by a short recital of the purchase deed, settlement, or will, under which the owner, or his ancestor, or testator, became seised or entitled ; or it is done, at this day, as was the common practice in former times, by way of superadded description to the parcels, in a clause to this effect, "*Which said messuage, &c. were formerly the inheritance of who died intestate, and descended from him to his nephew and heir at law, who by his last will and testament, &c. devised the same to, &c.*" Or in this form, "*Which said messuage, &c. were formerly the inheritance of A. B. to whom the same were conveyed by indentures of lease and release, bearing date, &c. and made or expressed to be made between, &c. And the said A. B. by indentures of lease and release, bearing date, &c. conveyed the same to, &c.*"

Of course this clause may be varied *ad infinitum*, according to the circumstances which call for its application.

It remains only to be observed, that such recital or clause of description may be called in aid of the evidence of the title, so as to carry back the same to the period of the more early deed, of which notice is taken; and such his-

tory of the title is deemed satisfactory by conveyancers, except in particular circumstances which call for more than ordinary caution.

It is even evidence against any person being a party to the deed, and who gives this history of the title.

As often as a title is derived by *grant from the crown*, as is the case with all rectorial tithes, &c. the original grant should be abstracted, for the purpose of showing that no reversion or remainder was reserved by the crown; but it is not necessary to trace the title through all the intermediate stages. At least this is the general practice and more prevailing opinion.

The reason for requiring evidence of the original grant from the crown is, that a reversion or remainder in the crown cannot be barred by fine or recovery.

Formerly the maxim of the law was "*nullum tempus occurrit regi*;" so that there was no limitation of time to bar the right of the crown.

By the statute of the 9 George III. chap. 16, the crown is disabled to sue or implead any person for any manors, lands, or hereditaments, &c. where the right hath not, or shall not first accrue and grow within sixty years next before the commencing such suit, &c. and the subject is secured in the free and quiet enjoyment thereof, as well against the crown, &c. as all persons claiming any estate or interest therein, by colour of any letters patents or grants upon suggestion of concealment, &c. wrongfully

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detaining, for which judgment hath not or shall not be given to the crown within sixty years before the commencing such suit.

Several provisos and exceptions will be found in the act.

It is a great drawback on the utility of this statute, that no purchaser can have the benefit of the enactment, if the lands he has purchased are parcel of an *honor*, &c. and such honor, &c. has been put *in charge* within the limited period. There are few farms, &c. which are not parcel of an honor, &c. which remains in the crown, and is continued in charge; and entire honors, &c. are of too much importance to be obtained by *intrusion*.

In an abstract of title concerning *advowsons in gross*, the title should be stated from as remote a period as circumstances will admit, and *presentations* by the successive owners should be shown, as the best evidence of seisin. The title to advowsons has been subjected to certain statutes of limitation; but these statutes have been repealed, so that a title may be outstanding after a seisin for more than sixty years.

It frequently requires and merits great consideration, at what period the commencement of the title should be taken up, when the seller is in possession of title deeds which carry back the evidence to a very remote period.

On the one hand there is a want of candor, not to say of honesty, in withholding any mate-



rial information from the purchaser, since a title may be radically defective if all its circumstances were disclosed, although it may, by the abstract, be made to appear perfectly good.

On the other hand, by carrying back the evidence of title beyond a reasonable period, the vendor may involve himself in difficulties which may not be easily removed; especially if the abstract should fall into the hands of an unwilling purchaser, a troublesome or timid solicitor, or of a conveyancer who will not be satisfied with probabilities, and with those presumptions on which the more candid and more experienced gentlemen of the profession, feel it a duty to the public, and for the interest of their clients, to rely. And let it never be forgotten, that many an advantageous bargain has been lost, and the convenience of a purchaser sacrificed, by objections and difficulties which were more ingenious than solid; more cautious than wise.

In cases of this sort, the duty of the solicitor appears to be, on the one hand, not to disclose the title by the abstract, beyond the common and ordinary rules of practice, either from mistaken candor, or from the still more culpable motive of extending the abstract, for the purpose of increasing his fees.

On the other hand, if the solicitor be aware of any defect in the title, he ought not wilfully to conceal the same.

It is his duty to disclose all the deeds and wills which may raise the question, and to leave the purchaser's solicitor or counsel to his own discretion in deciding for himself.

In particular, when the solicitor for the vendor knows that some of the parties are in a state of mind which renders their sanity, &c. or the fact of their majority or legitimacy doubtful, he ought not to withhold from the purchaser the means by which the fact may be investigated, unless the parties are known to the purchaser or his solicitor, and the purchaser or his solicitor has equal information with the vendor.

But as it often happens that a defect in the title disclosed to a purchaser leads to a claim by a person who may assert a title founded on this defect, it is a very prudent caution on the part of sellers, to have their title thoroughly investigated by their own counsel, before they offer their lands for sale; so that they may be satisfied there is not any reasonable chance of exposing their title to a successful claim, or even to a troublesome and expensive litigation.

Nor is this the only advantage to be derived from such previous investigation of the title, under the advice of those who are conversant with the subject.

The formal difficulties with which the title may be attended may be pointed out; the necessary means may be taken to remove the same; and if they be found insurmountable, the precise circumstances of the title may be

stated by the particulars or conditions, or contract of sale ; and stipulation may be introduced into these particulars, or into the conditions or contract, so as to preclude the purchaser from all right to object to the title on these grounds.

Such stipulations seldom injure the sale, or materially affect the price ; and they prevent the infinite trouble and the heavy expense frequently incurred for want of this precaution. Such objections are too frequently taken, or if not originally taken, are insisted on, for the purposes of delay, or to impose on the seller terms to which he would not otherwise submit : and they involve the seller sometimes in considerable difficulties, and not unfrequently in actual ruin and bankruptcy, by depriving him of those means by which he expected to discharge engagements, into which he had entered on the faith of this resource, which thus fails him.

Should a vendor think fit to deliver the deeds to a purchaser, as a substitute for an abstract, the purchaser would have a right to require the vendor to take back the deeds, and insist on an abstract at the vendor's expense.

Should an abstract be withheld, its delivery may be compelled in equity, under a bill for specific performance ; and deeds, &c. which are suppressed or withheld may be brought to light by interrogatories in the bill, or under the usual order, and the interrogatories exhibited under that order.

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A reluctant vendor may make the title appear ineligible or defective, merely to induce a purchaser to forego the specific performance of a beneficial contract.

A person playing this game, merits severe animadversion, and even punishment; and every means should, for public example, be taken to bring forward the real state of the title. And a contract abandoned under a fraud thus practised, may, it should seem, be revived at a subsequent period, on a detection of the fraud. The existing equity, under the contract, would bind a purchaser, with notice of the grounds on which the contract had been abandoned.

On the other hand, when a purchaser insists on specific performance, and at the same time, for the sake of delay, and to make use of the money in trade, or in any speculation, requires information not in the power of the vendor; or requires the concurrence of persons not under the vendor's control, the vendor should file a bill to compel the purchaser to make his election, to accept the title as it stands, or to rescind the contract.

Many purchasers have by these means been compelled either to pay the price, or abandon the contract.

### *Of the Form of the Abstract.*

**EVERY** abstract should have a head or title.

This part of the abstract should propound the names of the persons whose title is to be considered, the estate or degree of interest they have, and the lands to which the attention is to be directed, and names of the parishes and county in which the lands are situate; and as far as it is practicable, connect the modern with the ancient description of the parcels :

The form may be to this effect :

An abstract of the title of *A. B.* to the fee-simple and inheritance of the manor of

in the county of \_\_\_\_\_ ; or a  
farm, or close in the parish of \_\_\_\_\_ called  
\_\_\_\_\_ ; or to a farm, &c. or close, &c.  
in the parish of, &c. \_\_\_\_\_ containing,  
&c. \_\_\_\_\_ formerly parcel of a farm  
called \_\_\_\_\_ or to a farm, &c. formerly  
called \_\_\_\_\_ and now called \_\_\_\_\_

When the lands are held *for lives*, or for the residue of a *term of years*, then the head of the abstract should be in this form :

An abstract of the title of \_\_\_\_\_ to a  
farm, &c. called \_\_\_\_\_ situate in, &c.  
for the *lives* of \_\_\_\_\_ ; or for  
the residue of a term of \_\_\_\_\_ years;  
or the residue of a term of \_\_\_\_\_ years, now *deter-*  
*minable on the death of* \_\_\_\_\_

These particulars are to be given by way of intimation, to direct the attention of the soli-

citor for the purchaser and the conveyancer, to the specific lands which are the subject of the title to be considered by him, so that he may read every part of the abstract with a due application to the parcels.

Of course the head of the abstract should be varied, in point of form, as circumstances may require; thus directing the attention to those points which are most material and prominent.

And when the lands are of *copyhold tenure*, or *customary freehold*, or are held in *gavelkind*, or in *borough English*; or there is any other customary mode of descent or peculiarity, it should appear in the head of the abstract.

And as to lands in *Kent*, which are presumptively all of gavelkind tenure, it should be noticed that the lands have been disgavelled, if such be the fact.

Sometimes an abstract is prepared with a view to show the title to divers farms; and this abstract is made for the use of different purchasers, who have purchased different farms, or different parcels, so that one abstract is made to answer the purpose of several purchasers.

This is a slovenly mode of transacting business, and frequently leads to infinite trouble to the conveyancer, as his attention is directed to points in no ways material to his client.

In cases of this sort, a particular of sale, with an intimation of the lands which are purchased, or a copy of the contract, should accompany the abstract; or, which is still preferable, the soli-

citor for the vendor or purchaser should, by a note at the head of the abstract, or by some indorsement on the same, state the particular parcels purchased by his client ; and those parts of the abstract which are relevant should receive some mark of distinction ; or rather those parts which are immaterial should be noticed as such, or cancelled. It would, in many cases, be well worth the trouble and the expense that the solicitor for the purchaser should frame a new abstract out of this heterogeneous mass.

But the practice of encumbering the margin of the abstract with notes, criticisms, &c. or any other observations, except material facts, should be avoided. Such observations are not in their proper place ; they distract the attention of the conveyancer, and they interrupt that train of reasoning and connection of facts, which must be pursued to do justice to the client. Observations (if any are to be made on the law, &c.) should be at the end of the abstract, or in a separate statement.

In deducing the title to advowsons the presentations should be shown at the head of the abstract. It may be thus intituled ; “ A statement of the presentations, with the names of the patrons, and of the clerks, presented during the period of this abstract.”

Thomas Squire, clerk, presented by Thomas Nicholson, March 12, 1690.

Thomas Dalton, clerk, presented by William Cartwright, March 4, 1740.

E. Cartwright, clerk, presented by William Cartwright, November 2, 1749.

N. Stow, clerk, presented by Catherine Cartwright, spinster, July 31, 1794.

Edmund Cartwright, clerk, presented by Catherine Cartwright, spinster, April 2, 1802.

Thomas Raddish, clerk, presented by Duke of Norfolk, January 17, 1805.

Care should be taken that these presentations are warranted by the title, as disclosed in the abstract.

In general the abstract should state the different deeds and wills of which the title is constituted, in the order of their dates.

Sometimes it happens that a will has been revoked by a subsequent settlement, recovery, fine, or other assurance.

In this case the more prevailing practice is to state the settlement in the first place, and the will in a subsequent part of the abstract; and then if the conveyancer should not pay particular attention to the order of the dates, the question of revocation would not be raised in his mind. This oversight may happen even to the most cautious person, unless he has formed the habit of paying especial attention to this point.

In fair and candid practice the will ought to be stated according to its date, and consequently as preceding the settlement, &c.



*Arrangement of Abstract.*

HOWEVER there are many cases in which it is even eligible, and almost a duty on the solicitor, to simplify the evidence of the title, by giving a different arrangement to the abstract. This is the case, as often as the abstract relates to different parcels of land, or different terms which have been purchased at different times, and have ultimately centered in one person. And it is also the case, as often as a farm, or other property, has vested in several persons as tenants in common, co-parceners, or even as joint-tenants, who have severed the tenancy, and there is, through a long series of years, a different deduction of title to the different shares.

This mode is equally eligible, whether the different shares have already united in one person, or they are, on the present occasion, to be purchased from the different part-owners. In instances of this sort it is also proper to give different heads to the different parts of the Abstract ; *for example ;*

*As to the farm called A, purchased of B ;*

*Or as to the third part or share of A.*

*And* when two or more farms, or two or more shares, become vested in the same person, and the title, applicable to the several farms, or the several shares, is united, there should be a new head directing the attention to this fact ; thus,

*As to the farm called A, purchased of C ;*

*And the farm called B, purchased of D ;*

*Or as to the third part formerly of A,*

*And the third part formerly of - - B.*

Of course the abstract should in every instance be varied in this respect according to the circumstances; and if a will be so dated that it is prior to some of the purchases, and consequently inoperative as to them; while it is subsequent to other purchases, and governs the title to the parcels so purchased; a memorandum ought to be made to express this circumstance.

It should be at the end of each purchase deed; and to this effect:

The will of \_\_\_\_\_ was made prior to this purchase; or subsequent to this purchase; or the memorandum should be at that part of the abstract which introduces the will, and be to this effect;

‘This will was prior to the purchase made in the year \_\_\_\_\_.’

### *Objects of Abstract.*

THE object of every abstract is to enable the purchaser or his counsel to judge of the evidence deducing the title, and of the encumbrances affecting the title.

Every title involves in itself the question of legal and beneficial ownership.

On the one hand, it is in vain that there is a good title at law, if that title be bad or defective in equity.

On the other hand, it is not sufficient that there is a good title to the legal estate, or to

the equitable estate, if it be encumbered with *judgments, legacies, debts to the Crown, or other charges* to its value ; for in proportion to the extent of such encumbrance will there be a reduction in the actual value of the interest of the vendor.

In short, every abstract should describe whatever will tend to enable a purchaser, or his counsel, to form an opinion of the precise state of the title at law and in equity, together with all chances of eviction, or even of adverse claims.

And these points should be kept in mind in preparing the abstract of title, and also in comparing the same with the documents or evidences of the title.

In the following observations an attempt will be made to direct the attention to those different points.

#### *Substance of Abstract.*

EVERY abstract ought to consist of a short statement of the material parts of the deeds, wills, and other documents or writings, if any, and records and private Acts of Parliament, and even of public Acts passed for private purposes, which can in anywise implicate or affect the title.

To these should also be added such facts as fill up the interval of title, as descents, deaths, marriages, births, burials, and other circumstances generally called *matters in pais*; or facts which may vary the state of the title, as happens in titles which depend on special limitations or

contingencies, in which the right is made to arise upon some fact or event; and also in titles by descent, &c.

All facts which are stated should be stated correctly, and the seller should be prepared to verify or authenticate them by legal evidence; and the purchaser's solicitor should take care that such evidence will be within the power of his client.

And as often as a title depends on a descent from a remote ancestor, a pedigree should accompany the abstract; and it is the duty of the solicitor, on the part of a purchaser, to take care that the pedigree should be authenticated; not only by such evidence as would be deemed *prima facie* proof in a court of law of the title of the supposed heir, but such evidence as it would be incumbent on him to give for the purpose of supporting the title in the event of an adverse claim.

This is more particularly the case when the vendor is not in possession, but is to transfer a remainder, a reversion, or other remote interest. However no case of this description is to be considered as governed by any precise rules. Circumstances will and must occasion the necessity of exercising a discretion in this respect. The material distinction to be kept in mind is, that a man may be able to give *prima facie* title of being heir, while in point of fact he is not heir.

The observations which have been made, are to be considered as applied to a title which of a recent date depends on such extraneous facts;

for if these facts arose at a very distant period, and the title was claimed on their foundation, and there has been a possession consistent with this state of the title, then the possession furnishes the necessary evidence of the facts, or rather such a presumption of them as, in many cases, may be safely relied on ; and the cautions which are recommended are to be adopted only in proportion as the facts admit of more certain and decisive proof.

For instance, if it appear that thirty or forty years ago, *A* died, leaving *B* his heir at law, and that *B* entered and enjoyed without interruption ; and that he sold, and that the purchaser entered, and had peaceable possession ; no one, except under extraordinary circumstances, as an asserted claim, ever thinks of requiring any evidence to prove the fact that *B* was the heir at law.

Of all titles depending on descent, those to be viewed with most jealousy, and accepted with the greatest caution, are those in which a *maternal heir* claims the right of succession ; and enters into possession on the ground that there is a failure of paternal heirs.

Evidence of extinction or failure of inheritable blood, in the line of the father, by reason of *attainder*, or *alienage* or *bastardy*, may exempt the title of the maternal heir from difficulties or suspicion.

But in all other cases, though the paternal heir may not have been found ; and though the maternal heir may have obtained undisturbed

possession ; or though he may, even against a tenant, or an *abator*, have established a title by the judgment of a court, yet it does not follow that his title is good. The probabilities, indeed, are, that it is defective. In the nature of things there must be a paternal heir, though he neither has been or can be discovered.

This probability is increased in proportion to the number of progenitors, whose issue must have failed, before there can be an extinction of inheritable blood on the part of the father, or other paternal ancestor.

The like difficulty occurs when the *father*, or *grandfather* or *great grandfather*, is the purchasing ancestor, and some one who derives a title under a very remote and distant branch of the family, claims and even establishes a *primâ facie* title as heir. The chance of a more immediate heir renders caution necessary.

Experience proves, that in titles of this description, more remote heirs obtain the possession ; more immediate heirs recover against them ; and they, in their turn, are evicted by persons who prove themselves to be nearer in the line of inheritable blood.

Titles, involving these circumstances, have generally been fortified by a fine with proclamations. Such fine and non-claim certainly add to the security of the title. But disabilities may have protected the actual heir from the bar of the statutes of non-claim on fines.

Few titles are therefore to be accepted with

more caution than a title by descent asserted by an heir, in a remote degree, from the first purchaser, or the person last seised.

So if a limitation be made in favour of the first son of *A* in tail, and a person claiming to be the first son has either in the lifetime of his father, together with his father, or after the death of his father, and alone, suffered a recovery, and the possession has been consistent with the title derived under that recovery, the recognition by the father, of the son, as his first son, or a continued possession for several years, is considered as reasonable evidence of the fact, that this son was the *first* son. But in proportion as the title is of a modern date, caution may be even necessary in this case; for it has more than once happened that such son has been *illegitimate*, and the fact of *illegitimacy* has been suppressed. The certificate of baptism, and an affidavit of legitimacy, are the proper precautions against a surprise in this particular.

In some cases it has happened that the limitation has been confined to *the first son* without extending to the second son; and the person who, in point of fact, was the first son, died at a very early age; and his death has been cautiously concealed for the purpose of enabling the second-born son to assert a title to the estate. In such case no register of baptism will be found.

This happened in a county near the metropolis, and the fact was never discovered till the second-born son was about fifty years of age,

and then, like most other cases of fraud, it led to his ruin, or at least hastened it.

In many cases also more caution is necessary than is generally adopted to ascertain the fact, that the person who claims as heir, or as the eldest or other son, is legitimate. In various instances titles have proved defective in consequence of taking this for granted, or, in short, from the inability to disprove the fact.

And when titles depend on recoveries suffered by an heir in tail, the attention is not so frequently directed as it ought to be, to ascertain that the freehold was not outstanding at the date of the recovery, in a tenant by the curtesy, or a tenant in dower.

It is observable, however, that a mere title of dower does not raise any impediment to the validity of a recovery.

It also sometimes happens, that *infants* are married with the consent of guardians appointed by the ecclesiastical court, instead of being married with the consent of guardians appointed by the court of chancery. Such marriages are void, and of course the issue illegitimate.

A case of this sort occurred, in which the parties were apprized of the law before the birth of the child who was to take the first estate tail under the marriage settlement, and from a mistaken delicacy, no entreaties could prevail on them to be re-married, though both were adult.

A child was actually born illegitimate : but



fortunately for him he died while of tender years ; but yet there is no doubt if he had lived to attain the age of majority the circumstance would have been buried in oblivion, at least for a long period of time, and he would have asserted a title to the estate, and the title have been accepted under a conveyance from him, without any inquiry into his legitimacy ; since all the neighbours, and among them the purchaser, would have assumed the regularity of the marriage, from habitual belief that the father and mother were husband and wife legally married.

In instances of this sort, local knowledge misleads by substituting belief in the place of *evidence*.

Entries by *disseisin*, *abatement*, *intrusion*, &c. may also materially affect the title, and when they have existed they should be stated.

Wills may be revoked, and consequently become inoperative by such disseisin ; and *re-entries*, &c. may also be equally relevant, by restoring the effect of the will : and they should be stated when any conclusion may depend on them.

The state of a title by descent may be varied by such entry, &c. and a *possessio fratris* ; or the nature of the remedy, and consequently the period of bar under the statute of limitations, may be changed ; for instance, if there has been an abatement or intrusion, and it is avoided by entry, and an actual seisin acquired a writ of right may become the remedy, in-

stead of a writ of entry sur abatement, or sur intrusion, &c.

*Of the Form of the Abstract.*

The more immediate form of the abstract will now be the subject of consideration. For this purpose the observations will be applied,

- 1st, To deeds.
- 2dly, To records.
- 3dly, To acts of parliament.
- 4thly, To commissions of bankrupt.
- 5thly, To wills and their probates.
- 6thly, To administrations.
- 7thly, To decrees.
- 8thly, To judgments ;

Since these are the several documents from which an abstract is generally prepared. It is to be observed, however, that *mere agreements* are to be abstracted in like mode as deeds ; and therefore must be considered as falling under that head of division.

Every formal deed consists for the most part of several particulars or clauses, viz.

- 1st, The date.
- 2dly, The *style* or *character* of the deed.
- 3dly, The names of the parties.
- 4thly, The recitals.
- 5thly, The testatum, or operative clause ; and this clause is again subdivided into several parts, viz.

- 1st, The part which expresses the consideration.

2dly, The name of the grantor, words of request, &c.

3dly, The operative words of grant, and

4thly, The name of the grantee.

5thly, In some cases, a reference to a lease for a year, as in releases founded on a previous lease for a year.

6thly, The parcels, with their description ; and either with or without an *exception*.

7thly, The general words, and the clauses of reversion, estate, deeds, &c.

8thly, The habendum, or clause limiting the estate.

9thly, In some cases a reddendum.

10thly, In some cases a declaration of uses.

11thly, In some cases a declaration of trusts.

12thly, In some cases, a condition or conditional limitation, by way of shifting or springing use ; or a clause of agreement for redemption in equity ; or some other special agreement which may affect the title in equity, if not at law.

13thly, Powers.

14thly, Covenants for the title, or other covenants which may affect the title, and either with or without exceptions introduced into these covenants.

15thly, The execution.

16thly, The attestation.

17thly, The receipt.

In this arrangement, a simple deed is con-

templated ; but many deeds may be considered as compound ; consisting of various testatum clauses, and consequently with a repetition of all or several of these clauses.

This is particularly the case in deeds which convey freehold and leasehold lands ; or freehold or leasehold lands and personal estate ; or which convey the inheritance, and also assign a term or terms for years in the same lands, or release any encumbrance affecting the property.

As often as a deed consists of these various parts, the abstract must state these parts, as far as they are relevant and material to the title under consideration.

There are also some cases (as in *articles* for a settlement, &c. and agreements creating an equitable lien), which do not contain the different formal parts already noticed ; or at least do not exhibit them in the order they are enumerated ; but they necessarily have these particulars in substance, or in construction of law, though they may not have them in point of form ; for every deed or instrument, *inter vivos*, which is effectual at law, or in equity, must, in terms or in substance, have

1st, An agent, grantor, or party contracting.

2dly, A patient, grantee, or person with whom the contract is entered into.

3dly, The parcels, or subject, about which the grant or contract is concerned ; and

4thly, The terms upon which that grant is made, or contract is entered into.

1st, *As to the date.*

The date should be stated, and for the facility of reference, it is generally given in the margin ; and when an assurance consists of several parts, as in the instance of a lease and release, the date of each instrument should be stated.

2d, *As to the style or character of the deeds.*

It is also usual, in introducing the different parts of a deed, to state the mode of its operation, thus, " By indenture of lease. By indentures of lease and release. By indenture of feoffment. By indenture of assignment. By articles of agreement. By indenture of bargain and sale inrolled," or the like.

And when a deed consists of several operative parts, it is also usual to refer to its different operations in these or the like terms, " By indentures of lease and release, or indenture of lease, and indenture of release and assignment," &c. This exordium brings the abstract, in effect, to state, that by indenture, &c. a particular person, or certain persons, did grant, &c. or that by indenture, &c. after reciting, &c. a particular person, or certain persons, did grant, &c. And this is the general form adopted in practice. Sometimes, however, deeds are abstracted in this form ;

" 1st May 1804, an indenture, or indentures of lease and release, made, &c. whereby, after reciting, &c. *A. B.* did, &c." but though this mode is sufficient for the purpose, the former mode appears more correct, and is to be preferred, as

being the form generally adopted, and as guarding against the appearance of singularity.

Under this division it will be proper to notice that in case of a simple abstract, or an abstract concerning one farm, or one estate only, carried on by a regular series of deeds, the deeds, wills, &c. should be abstracted in the order of their dates. But in compound or complex abstracts; as in the instance of several farms purchased at different times from different persons; or a farm which is subdivided into different shares, which become the subject of different sales, mortgages, settlements, &c., the arrangement should keep the title to each farm, or each share, in a connected series, as long as the title remains distinct. On this point a former observation, directing the mode of arrangement of the abstract should be consulted.

3dly. *As to the names of the parties.*

Every well-penned deed names the grantor and other parties, with their additions, viz. the places of their residence, their professions, callings, &c. and sometimes, indeed frequently, it adds the description of their characters, as heir at law, executor, &c. trustee, &c. or surviving executor, &c. surviving trustee, &c.

In abstracting ancient deeds it is not necessary to do more than state the names of the parties, without adding the places of their residence: but it is always proper to add the descriptive character in which they acted, namely, as heirs, executors, &c.; since this description

affords, at one view, an intimation of the character in which they conveyed, &c. and connects the title with the former part, if any, of the abstract, and if there be not any former part of the abstract, it may lead to an inquiry which will tend to elucidate the title, or will induce the production of evidence, which will have that effect.

There are also many cases in which it is proper to add the additions of the parties, either for the purpose of distinguishing them from other persons of the same names, or affording the information necessary to a search for their wills, the birth of children, or the like circumstances connected with their residence.

This is more particularly important, in reference to persons through whom a title must be derived, with a view to some act to be done, to render a title complete by supplying a defect in the same, or investigating a pedigree.

In some deeds a great number of persons are introduced as parties, and the acts done by many of them are immaterial to the title under consideration.

As often as this happens these parties should be named very briefly, or there should be merely a reference to them in these or the like terms, "several other persons, of the 2nd, 3rd and 4th parts."

And to render a reference to the different parts of the abstract more easy and more obvious, it is very eligible to arrange the different parties in different lines, thus,

Between,

*A. B.* of the 1st part,

*C. D.* of the 2nd part,

*E. F.* of the 3rd part, &c. &c.

For it may be justly observed, that whatever assists the eye to read, or to collect the facts, will leave the mind more free to ascertain the effect of the deeds, and to form a correct estimate of the connexion of the facts with the former and subsequent parts of the transaction.

In this part also of the abstract, if it has not been done in a previous clause, it is very convenient for the information of the person by whom the abstract is to be perused, to aver such facts as may tend to elucidate the title in the progress of considering it; for example, Between *A. B., since deceased*; or *A. B., who was the heir at law*; or *was the surviving child of, &c.*; or *who had then survived A. B. and C. D. his co-trustees*; or *who is executor, &c.*, or *who is a trustee, &c.*

This however is proper, only when the information is not introduced into a former part of the abstract, or will not occur in its proper place in the recitals of the deed in question.

These statements should be in brackets, that they may appear as *averments*, distinguished from statements in the deeds; since, as statements in the deeds they would receive more credit, and be allowed more weight than they would receive, or be allowed, when they are stated by way of averment, for which proofs are to be adduced.



4thly, *Of the recital.*

Immaterial matter contained in the recitals of a deed should not be stated in the abstract ; or should be stated as concisely as possible. On the other hand, recitals, which may materially affect the history of the legal or equitable title, should be fully expressed.

On the other hand, it is pregnant with inconvenience to introduce recitals in this or the like phrase : After reciting *among other things*, without adding, “not material to the present title,” or some expression to that effect.

The recitals generally deemed material to be introduced fully into the abstract are of former deeds, &c. not in the power of the vendor, and which show a deduction of the evidence of the title, so as to carry it back to a more remote period ; descents, and other facts which fill up those parts in the chain of evidence which are wanting.

In transactions of small purchases, in which the lands were *parcel* of a large property, the nature of the transactions leads to the conclusion that the deeds remain in the hands of the former proprietor, or were delivered to the purchaser of a larger estate ; and such recitals are, with great reason, as hath already been noticed, considered as affording a reasonable presumption of the correctness of the statement ; especially when taken from deeds executed at a distant period ; say thirty or forty years.

Such recitals are also relied on when there is

reasonable evidence that the title deeds themselves have been destroyed by fire, or casually lost. In titles derived under deeds of a more modern date, and which are in existence, it is proper that reference should be had to the deeds themselves, either by the solicitor for the purchaser, or some one employed on his behalf, that the purchaser may be satisfied that the abstract is correct.

In settlements founded on marriage articles, the articles should be fully abstracted, as far as they are material, and are recited in the settlement; unless the articles themselves are previously abstracted. This statement is generally given as a recital in and as part of the abstract of the settlement.

Another and more eligible mode, is to give the recital, as it occurs in the settlement, by way of previous statement, so as to precede the abstract of the settlement; but then this part of the abstract should be stated, as taken from a recital in the settlement; thus, *in the settlement next abstracted there is a recital to this effect, viz: By indenture, &c.*

Deeds of trust, on which another deed is founded, are open to the same observation. So are all other agreements which may materially affect the title at law or in equity.

A distinction however may be made between articles or trusts which are from the period of their date relevant to the title of those of identical lands which are the subject of the abstract; and

those articles and trusts, (as articles and trusts under the directions of which the lands are purchased), which do not affect the title, until the lands are purchased or settled.

Articles and trusts, of the latter description, seem to fall most naturally into the order of being stated in the abstract of the deed in which they are recited ; or they should be inserted immediately before the purchase deed executed in pursuance of these articles or trusts.

Care however must be taken, even when the articles are recited, that the effect of the articles has been correctly given.

For this purpose the original articles should, if circumstances admit, be inspected ; and if the recital be incorrect, the purchaser's solicitor should, by a rider, or by a correction of the abstract, supply a full and faithful statement of the material parts of the articles, as far as these parts are omitted. In most instances it will be found more convenient to cancel the former notice of the articles, and substitute in its place a correct abstract of the articles.

When an indenture of a former date is recited in a deed of more recent date, then, if no statement of the recited deed is introduced into a former part of the abstract, the recital should be given at large, as to all the material points. But as often as the deed so recited is introduced into a former part of the abstract, there should be a short reference to the deed, and this will be sufficient, except so far as the recital

does, by averments, or other means, disclose new and material information, and then such additional facts should be abstracted.

The general mode of reference to such recitals is in this form :

After reciting the indentures of the      and  
days of      and      day of      .

And it is in all cases proper that such or the like reference should be made.

And it is attended with convenience to have the reference to the different deeds arranged in columns, thus :

After reciting the indentures of

1st and 2nd May, 1700.

2nd and 3rd April, 1720, &c.

4th and 5th April, 1721, &c.

An additional convenience arises, in long abstracts, from a reference to the page in which the recited deeds are to be found : and, under the like circumstances, it greatly assists the memory, and preserves the chain of thought, and the due application of the judgment, to give a short reference to the operation of the deed by these or the like terms :

After reciting the indenture of the 1st and 2nd May 1700, p.4. (being the settlement made on the marriage of *A. B.* with *C. D.*)

And also the indentures of the 2nd and 3rd April 1720 (being the conveyance in fee to *I. K.*)

These references should be varied so as to be

adapted to the circumstances. But such references are of use only in abstracts of title, which are of great length, and require such aids to assist the memory, and bring the transaction more within the compass of the mind, without the labour of a classification of the abstract, and a digest, to be made of the same.

In this part also of the abstract, any mistakes of dates, &c. which may occur, should be noticed in this or the like manner:

After reciting the indentures of the 1st and 2d May 1700 (*therein by mistake recited as indentures of the 2d and 3d May 1700*).

Sometimes *an error in the recital* of the date of the deed is material, and may affect the validity of the title ; for instance, a lease, bearing date the 1st of March, is recited as bearing date the 2d of March, and then there is an assignment of all the lands which were demised by the *hereinbefore in part recited indenture of lease*.

Now as there is not any such indenture of lease, there is, in point of law, no valid assignment ; for, as the date in the recital is the essential part of the descriptive terms used in the assignment, the assignment itself fails of effect.

To avoid such and the like mistakes, the modern and correct practice of preparing the recital of deeds, as bearing *date on or about, &c.* should be more generally observed, so that the

date may not be conclusively material ; and as a consequence, the error may not vitiate the assignment.

The books seem agreed that an assignment made with reference to an erroneous and positive recital would be void ; yet, it is likely that judges of modern times would, from the other certainties, if any, of the lease, to be collected from the names of the parties, the parcels, &c. reject the erroneous date, and support the assignment.

It would not, however, be safe to rely on the liberality of the courts to interpose against rules of law established by decided cases, and founded on those principles which require that every contract should be proved by the contents of the deed which contains the evidence of the transaction ; and an assignment of a lease, assumed to be dated the 1st day of April, cannot be predicated of, or pleaded, or given in evidence as an assignment of a lease, dated the 2d April. Equity may on those occasions of sale for a valuable consideration, &c. which give jurisdiction to that court, correct the mistake ; while a court of law must take it for granted, that there is another lease of the date which is recited.

Various distinctions occur on points of this sort. When the recital is correct, or an inaccuracy in the date, &c. is rendered immaterial, then a subsequent error in referring to the date will not vitiate the deeds ; for instance, if the lease be recited as bearing date on or about

the 2d day of March ; and then the assignment is made by words to this effect :

“All those messuages, &c. which were assigned by the said indenture, bearing date on or about the 4th day of March ;”—this error would be immaterial.

In the first place, the courts may reject, as surplusage, the words, On or about the 4th day of March ; retaining the words, The said indenture ; and even though the 2d day of March were not the true date, yet the words, *on or about*, in the recital, would relieve the case from the difficulty with which it would otherwise be attended, by the admission of the actual lease in evidence ; for the actual lease will not be at variance with the recital of the date, since the recital has guarded against the error or materiality of the recital of the date.

*In this place* it may also be noticed, that when a person, or corporation, is once properly described, and afterwards the name is mistaken, as the said Richard, instead of the said John, no error in referring to the name, unless it be from uncertainty, by producing a doubt who is the grantor or contracting party, or the grantee, will injure the title.

Another observation is deserving of a place under this head.

Whatever errors may be in the recitals, and in whatever degree they may perplex the evidence in point of deduction, yet a substantive independent grant of parcels, &c. by a full de-

scription, or by certainties, which are free from mistake, will not be impugned by any error in the recitals; and the present disposition of the courts is never to give importance to inaccuracies, or mere technical objections of this nature, except so far as the judges are bound by positive rules, or by cases fully and clearly in point, as conclusive authorities.

In well-drawn deeds, such facts of death, and of contingencies, majority, marriage, &c. as will keep up the connection of the title, and show the different links in the chain of evidence, are uniformly recited.

The facts thus recited should be stated in the abstract, either as separate and independent facts, &c. in explanation of the state of the title, and so as to precede the deed which contains the recitals of these facts; or, as is more usual, and on the whole, more satisfactory, since the source from which the information is derived is shown, these facts are introduced as recitals, in abstracting the very deed which contains the recitals.

Such facts, &c. are frequently of the first and most essential importance to the title.

Without these recitals, the title would appear defective, and a strict inquiry would be made into the facts; and the title be considered as defective, in point of evidence, till satisfactory information could be obtained in answer to these inquiries.

Of this description are the facts of the *deaths*,



or *death and failure of the issue*, of persons having prior estates or annuities, or such like encumbrances ; also the *survivorship* of one or more of several persons, being either beneficial owners or trustees ; *some contingency* by which one estate was to determine, and another take effect ; deaths under age, or before portions become payable ; deaths of husband and wife without having had, or without having left, issue ; titles by descent, showing the death of the owner, and the *succession of an heir* ; and frequently the *different descents* to different heirs in succession ; *wills*, and the *devises* contained in them ; the *probate* of these wills, and the *courts* in which these wills were proved, and the time of probate (both which circumstances are useful ; partly to facilitate a search for the will, and partly to show the time of the death of the testator, or rather to show that he was dead before a given time ;) also *intestacies*, *administrations*, and the like ; also *settlements* made of certain lands to certain uses, for the purpose of complying with the terms of some *power* on which the title may depend : in short, these and all other circumstances which may be important to the title, either with a view to its deduction, or to show that it is free from encumbrances, should appear on the abstract.

Also if an encumbrance appear from a recital, it is the duty of the solicitor who prepares the abstract to state such encumbrance, even although it may not be existing ; and if he

should omit this part of his duty, the solicitor for the purchaser should take care that the omission shall be supplied.

For it is the province and duty of the conveyancer ultimately to consider, whether such encumbrance is or is not material, and whether there are any grounds for presuming that it has been released or discharged.

As notice of a deed is constructive notice of all its contents, the purchaser becomes implicated in the transaction; and it is fair that his counsel, or the person on whose judgment he relies, should have an opportunity of considering how far such encumbrance affects the title.

In all these and the like cases, liberal, and even honest practice, imposes on the solicitor by whom the abstract is prepared, the duty of supplying rather more information than may, in his own judgment, be material, than the latitude of withholding any fact or circumstance which may give a turn to the title; or show an encumbrance which once existed, however strong he may consider the presumption in favour of its having been discharged or satisfied, or barred by the lapse of time.

The *contract*, or the agreement on which the deed is founded, should, in general, be shortly stated; and in many cases it is material to state the contract fully, as an important part of the abstract.

This contract is particularly relevant when it is made by or with a person who is dead; so

that there is a conversion of the property from real into personal estate, and the mode of paying and receiving the purchase-money is varied by this change.

*For* instance, if *A*, who has the fee, contracts to sell to *B*, the interest of *A* is, in the view of a court of equity, and according to the rules of that court, converted into personalty ; and if he die his heir is considered as a trustee for the purchaser, and the executor of *A* is entitled to the purchase-money. On the other hand, the purchaser, or his heir, or (if any) devisee, is entitled to have a conveyance of the land ; and if the purchaser die, then, unless the contrary is directed by the purchaser, the purchase-money must be paid by his executor, out of the personal estate, for the benefit of the heir or devisee.

The same point, and also the date of the contract, are material, when there is, first, a contract, and secondly, a will, or a codicil republishing a will ; since the date of the contract may alter the state of the equitable title, as between the heir and devisee.

In order, however, that this change may be effectual, as between *heirs and executors*, it is essential that the purchaser should have accepted the title in his lifetime, or that the vendor should be in a situation to make such a title as a court of equity would have compelled the purchaser to accept.

For should the title prove defective, the heir at law of the purchaser, or the devisee, if any,

of the will of the purchaser, will not be at liberty to waive the objections to the title, so as to charge the executor or administrator with the price. But the executor or administrator may interpose and resist specific performance, on the ground of a defective title, and thus keep the amount of the purchase-money as part of the personal estate, instead of applying it, for the benefit of the heir or devisee, in performance of the contract. In *Broom v. Monk*, 10 Ves. j. 597, the purchaser had directed the contract to be carried into execution, without having in his lifetime accepted or approved the title, and yet the executor successfully resisted the claim of having the purchase completed out of the personal estate. But although the executor resisted specific performance, the *devisee*, and if there had not been a devisee, then the *heir* might have paid the price, and insisted on specific performance.

On this point various distinctions present themselves, and are deserving of notice in this place.

The effect of a contract as against the vendor, supposing the contract to be such as would be carried into specific performance, is,

1st. To convert the land into money, as between the *representatives*.

2dly, To *revoke the will* of the vendor in equity; but unless a conveyance shall be made in the lifetime of the vendor, the will of the vendor will remain in operation at law, and the

conveyance must be taken from the *devisee*, and the purchase-money paid to the *executor* or *administrator* of the vendor.

On the other hand, on the part of the vendee or purchaser.

1st. The money will belong to the vendor, and the land will, in equity, belong to the purchaser.

2dly, This interest in the land is devisable, and will pass under the general words, "all my real estate."—See *Seeton v. Slade*, 7 Vesey jun. 274, and 12 Vesey jun. 214.

3dly, Unless devised by a will subsequent to the contract, the right to the benefit of the contract will *descend* to the heir, v. *Lowther*, 12 Vesey jun. 214.

4thly, In either case, unless the contrary be directed by the purchaser, the purchase-money must be answered out of his personal estate, as far as there are assets for the purpose.

5thly, Though the purchaser take a conveyance after the date of his will, yet his will remains operative in equity on the equitable ownership, unless there be a new modification of the ownership by the conveyance. But the will, whatever may be its language, cannot transfer the legal estate, unless the will be made subsequent to the conveyance, or be republished after the conveyance shall be taken.

In short, whatever will tend to elucidate the title either at law or in equity, or may show in what manner the purchase-money ought to be

applied, and if circumstances will permit, that it has been duly applied, should be stated from the recitals, though the recitals are not evidence of the fact when the fact requires proof, as often as it cannot be stated from the original deed, &c. and as near as may be, these circumstances should be given in like manner as they would have been stated, from such deed or will, if the abstract of the deed or will, could have been given from the original instrument.

*Of the Testatum, or Witnessing Clause.*

AND first of the part which expresses the *consideration*.

The consideration should be stated in the abstract of every deed, either concisely or fully, according to the circumstances of the case ; for instance, when *A*, who is the absolute owner, sells to *B*, it is sufficient to state that *in consideration of 100l. paid to A by B*, with the addition, if such be the language of the deed, *for the absolute purchase, &c.* ; but as often as some trust, or power, requires that the money should be paid in a special manner, then that part of the deed which expresses the application, is to be detailed, and yet the statement without evidence would not prove the due application, unless the receipts of the trustees are to be discharges. In cases of that sort, the language of the clause should be fully detailed, so as to show that all the requisites of the trust, or circumstances of the power, have been observed ; for example, in

consideration of                      paid to the said *A B*,  
by *C D*, at the instance and request, &c. of the  
said *E F*, in full for the absolute purchase, &c.  
or *in satisfaction and discharge*, &c., and to be  
*held and applied*, &c. ; and in all these and the  
like cases, the language of the deed should be  
closely pursued in the abstract.

Also when a deed is made in consideration of  
money payable out of a particular fund, as trust  
monies, &c., and a trust is implied from the  
mode in which the money is paid, or arises from  
the fund out of which it is taken, this circum-  
stance should be stated in the abstract.

So when a deed is made for a *particular pur-  
pose*, as for docking and barring all estates tail,  
&c. or for settling, &c. these objects should be  
noticed.

In general a short intimation of the professed  
object is sufficient. This clause is, for the most  
part, given more at length than is necessary for  
ordinary cases.

Under particular circumstances, however, (as  
where a settlement is made for a jointure, and  
in bar of dower, &c.) this part of the object  
should be distinctly stated, especially if it be  
the only part of the deed which can be used to  
exclude the wife from dower.

*Nominal considerations*, as ten shillings, and  
the like, should be noticed very briefly ; nor is  
it essentially necessary that they should be ex-  
pressed in any case, except in bargains and  
sales, in which it is the essence of the deed,

with a view to its operation in that particular mode, that there should be a *pecuniary*, or at least a *valuable*, consideration in money, or, a rent of a pepper-corn, &c. being *money's worth*, as distinguished from *friendship*, &c.

Sometimes a deed intended to operate in a given mode, may be defective as a conveyance of that description, but may operate, by construction of law, in some other mode, as a covenant to stand seised, or as a grant at the common law, &c.

As often as this circumstance occurs, the consideration of marriage, blood, &c. on which alone an assurance by covenant to stand seised can be founded, should be shown; and if it do not appear on the face of the deed, it should be stated as a fact, that consanguinity, or the motive of marriage, existed between the parties.

By the observation that it is on marriage, &c. alone, that a *covenant to stand seised* can be grounded, it must be only understood that such consideration is essential to its operation in this mode; not that the existence of another consideration, in addition to marriage, &c. will exclude this operation. From a variety of cases, it may be collected that a deed may operate as a covenant to stand seised, although it be founded partly on marriage, &c. and partly on a pecuniary consideration.

And an instrument intended as a covenant to stand seised, may operate, under proper cir-



cumstances, as a grant; or being inrolled as a *bargain and sale* of an use.

In this part of the deed it is also usual to acknowledge the receipt of the consideration money. Such clause should be noticed in the abstract, very shortly, except so far as it may show the due application of the money; and when the nature of the transaction does, under such circumstances as have been suggested, call for such specification, then the clause should be stated fully.

In *ancient deeds* the consideration is necessarily presumed to have been duly paid; but in reference to modern deeds, *courts of equity*, which, for the most part, have peculiar jurisdiction over matters of this sort, through the medium of trusts, require the purchaser to look to the receipt usually indorsed on the deed, as evidence of the payment of the consideration; and not to the receipt, generally contained, as a mere form, in the body of the deed itself.

The want of a receipt by indorsement, or in a separate instrument, is *implied notice* that the purchase money has not been paid, and raises a question of equitable lien in favour of the seller for his purchase-money, or so much thereof as does not appear to have been paid.

Such presumption, it should seem, is admissible only in deeds of modern date; for instance within the last twenty years; and in practice there seems to be a difference arising from the form of the deed

When a deed is expressed to be made in consideration of a sum then paid, the receipt is indorsed on the deed ; but if it appear by the recitals, as is oftentimes the case, on a re-conveyance by mortgagees, or their representatives, and sometimes even on sales to purchasers, that the purchase-money has been paid, and the deed is founded on that consideration, the substantive recital of a fact which previously existed, is, as between the parties, considered to be conclusive on the point, and no receipt is expected to be found as an indorsement on the deed ; and of consequence the want of such receipt does not appear to be material.

In a case of this nature, the recital of the payment of the consideration should be given in abstracting the deed.

Whether a *lien exists by reason that part of the purchase money remains unpaid*, must depend on circumstances.

*Prima facie* there is a lien ; and in order to show that the lien is excluded, there must be evidence to prove that the vendor relied on some other security, and had given up his right of lien.

Whenever part of the purchase money remains unpaid, and the vendor agrees to take a bond or note, or any other like security for the same, a few words should be added in the purchase deed when prepared, to rebut the presumption of a lien.

Any form of words will answer this purpose. It regularly falls into the order of being part of the clause, acknowledging the receipt, and may

be to this effect, *The receipt or satisfaction of which said sum of one hundred pounds, the said A. doth hereby acknowledge; and of and from the same, and every part thereof; and of and from all equitable or other lien, by reason that part of the said purchase-money remains unpaid, [or is secured only, and not paid], doth acquit, release, and for ever discharge the said purchaser, his heirs, &c.*

Whenever there is in this clause of the deed any expression which, on the one hand, shows that there is a lien for the purchase-money, or, on the other hand, negatives such lien, that clause should be inserted in the abstract.

2ndly, *The name of the grantor, &c.*

It should appear in the abstract who is or are named as the grantor or grantors; and when they are trustees, at whose request, &c. they made the grant; and if any particular mode of execution or attestation was prescribed, to express such request, &c. the clause which expresses this mode of execution, or attestation, should be stated.

The rule however that *non quod dictum est, sed quod factum est, respicitur*, is applicable; and it is material to show, by the *memorandum of attestation*, that these requisites were actually and duly observed.

Also, as often as a deed is made with reference to, and in exercise of, a *power*, the words of reference to the power, should be stated, together with the circumstances of the mode of execution and attestation; but the preceding

observation is equally, indeed more, relevant to this clause.

When there are several *distinct clauses of grant*, it is convenient and eligible to give them in *distinct clauses*, to render them more immediately obvious.

It sometimes happens that an abstract is so negligently prepared, and written in so close and small a hand, that it requires infinite care, and a great sacrifice of the eyes, to select and arrange, or even to collect, the operation of the deed, as to the different granting parties; and the mode of abstracting is sometimes so obscure, that the precise operation of the deed is rendered very confused. Nothing can be conceived more distressing to the conveyancer, or, in the result, more injurious to the client, than an abstract so prepared. Such an abstract never can have the same degree of attention, revision, and frequent consideration, as one written properly and legibly.

In this part of the abstract, a common error, unless such be the language of the deed, should be avoided. It is that of stating that it is witnessed that *A. B.* in consideration of, &c., then introducing the clause of grant, namely, the said *A.* did, &c.

This is a grammatical error, and it corrupts the sense. There are two antecedents applied to the same verb; each antecedent expressing the same thing; and one of them being incompatible with the rules of grammar.

As often as it occurs, as it frequently does, that the name of a grantor is omitted, so that in point of fact there is no antecedent to the verbs, which express the grant, the abstract should be a faithful transcript from the deed; and the fact of the omission of the grantor's name, should be noticed in the margin. It is the province of the conveyancer to judge whether such omission be material; and also his duty, though his attention be not called to the fact, to notice that the antecedent is omitted.

In several instances, and in particular in 2 Ventris 141, the courts of law have supplied in construction, the omission of the name of the grantor; and it may be safely concluded, that the courts will follow this precedent, as often as the context of the deed, renders it necessary to a sound and genuine construction of the several parts of the instrument, that the name should be supplied: but many cases may be supposed, of compound or complex deeds, in which it would be *uncertain* whose name was intended; and in such cases, the court would not feel themselves at liberty to render that *certain* by construction, which was, in point of intention, and of expression, left in doubt and *uncertainty*.

When a deed is made between two parties, and in all its parts imports to be a grant from one to the other, the court can seldom, if ever, be left in doubt respecting the intention, or have any difficulty in supplying the omission.

3dly, *Of the operative words of grant.*

These words should be given fully; in short, all the words of grant should be introduced, even though some of them may appear redundant, and though of necessity all of them cannot be operative.

And when there are several clauses of grant, the words of each clause should be furnished, and there is a neat, correct and technical mode of framing the abstract, so as to keep each distinct clause, as a distinct clause in the abstract.

4thly, *Of the name of the grantee.*

The grantee or grantees should, as a transcript from the deed, be mentioned in this part of the abstract; and the words of limitation which are to be found in this clause of the deed should be added, as to *A. B. his heirs and assigns*; or to *A. B. his executors, administrators, and assigns*; or to *A. B. and C. D. their heirs and assigns*; or to *A. B. and C. D. and the heirs of A. B.*; for as this is a material part of the deed, and this part of the instrument may influence the construction of other parts of the assurance, it ought to be given with fidelity.

In various instances, this part of the deed may be operative, and *the habendum rejected as repugnant*: and an opportunity ought to be afforded to the conveyancer of judging in what manner, and to what extent, decided cases are to be applied to the different operative parts of the deed.

In *Spyve v. Topham*, 3 East, 115, there were a lease and release; the release was made be-

tween one Thickeston of the first part, Topham of the second part, and Bass (a trustee of Topham,) of the third part. And in consideration of 700*l.* to Thickeston, paid by Topham, it was witnessed, that Thickeston confirmed *to Topham* and his heirs, to hold *to Bass*, and his heirs, to uses which gave Topham a power of appointment, while the lease for a year was from Thickeston to *Bass*.

An objection was made to the title, under a supposition, that Topham was the releasee, or grantee in the release; and that the estate for a year, the only foundation for a release, was in Bass, and not in Topham; so that Topham had not any estate capable of enlargement; and it was urged, that as Bass was named in the *habendum* only, and not in the granting clause of the release, he could not be deemed the releasee; but on the authority of 1 Inst. 7. a. Sheph. Touch. 75, *Butler v. Elton*, Carey's Reports in Chancery, 122, *Earles v. Lambert*, Alleyn, 41; in opposition to *B v. Coulter*, Cro. Eliz. 903, the court rejected the grant or release to Topham, and treated Bass, though named in the *habendum*, and not in the premises, or clause of grant, as the releasee, the judges observing, that the cases cited were perfectly satisfactory in authorizing them to put a construction on the deed, in support of it, which, from the reason and good sense of the thing, they should probably have done without such authorities.

Cases of this sort are founded on the rule, that a grant will be good, although the grantee be named as such in the *habendum* only, and not in the granting clause.

Further distinctions on this point will be noticed under that division which treats of the *habendum*.

When a *personal annuity* in fee, as distinguished from a rent-charge as such, is originally created, the deed creating the annuity should not only state the words of limitation to the grantee: it should also state the words of lien or obligation on the part of the grantor and his heirs; for instance, *A. B.* for himself, and his heirs, did grant, &c. to *C. D.* and his heirs; for an annuity in fee, as a personal charge, cannot exist, unless the heirs are bound to the payment of it.—Preston on Conveyancing, vol. 2, p. 469.

### *Of the Lease for a Year.*

IN the abstract of an assurance by lease and release, it is usual to introduce the abstract by these words, first giving the dates in the margin, “By indentures of lease and release.”

Sometimes there is a short reference to the lease for a year in the premises; thus, *in the actual possession, &c.* merely to show that the lease for a year is recited. This recital of a lease for a year is particularly important, when the lease for a year has been lost, or cannot be found.



It is also important in deeds of conveyance of *Irish estates* ; since, by the laws of Ireland, the recitals are conclusive evidence of the lease for a year ; or rather, no lease for a year is made, and the recital of a supposed lease for a year, supplies its place.

In conveyances of *Jamaica estates*, no lease for a year is used by the gentlemen most conversant with the laws of the island.

Some gentlemen have doubted whether the recital of a lease for a year, in a recovery deed, by lease and release, can be used against *issue in tail*, or persons in *remainder or reversion*. The gist of the objection is, that issue, remainder-men, &c. are not bound by *estoppels* ; but there is strong ground to contend that the recital is not used as an estoppel, but as evidence ; that the recital is evidence against the tenant in tail ; and that whatever is evidence against the tenant in tail himself, is evidence against all persons connected with him in privity of estate. It is clear that a copy of the lease and release, or of the lease for a year, would be evidence of the original against the issue and remainder-men ; and *à fortiori*, a recital by a tenant in tail of an act, as being his deed, must be the best evidence, next after the original, of the existence of the lease for a year.

The late case of *Holmes v. Ailsbie*, 1 Mad. Rep. 551, has not obviated the alleged difficulty. That case merely decides, that under the act of 14 Geo. II. c. 20, sec. 5, the recovery

shall be valid, notwithstanding the *loss* of the lease for a year, as part of the assurance by lease and release. That statute does not apply except there has been a lapse of twenty years since the recovery was suffered.

### *Of the Parcels.*

It has already been noticed, that at the head of the abstract there should be an intimation as to the parcels to which the attention is to be directed.

Sometimes, particularly when the description of the parcels is short, and uniformly the same in different deeds, or without any material variation, there is not any more eligible mode of describing the parcels, than by giving them at length, at the head of the abstract, in the terms in which they are to be found in the last purchase deed.

But this is not convenient, when the parcels run into great length; and it is inadmissible when the parcels are described in a different manner in different deeds.

The more general plan is to give the parcels at large, in abstracting the first deed, and in the terms of description which occur in that deed; and in the subsequent deeds to notice each variation, if any, which has taken place in the names, or other material parts of the description.

And as often as the abstract relates to a single

farm, which was formerly parcel of a manor ; or to a close, which was parcel of a farm, and the farm or close passed inclusively, under the general denomination, the abstract should state the parcels in these or the like terms :

All that the manor, &c. of which the farm, &c. or all that farm of which the close, &c. mentioned in the subsequent deeds, is parcel.

Another mode of arriving at the end proposed is to state in the head of the abstract, that the farm, &c. or close, &c. was formerly parcel of the manor of, &c. or farm of, &c.

But if the farm or close be particularly described in the deed in question, then the particular description should be given ; and if the farm or close in question, &c. passed under general words, or there be any error in the particular description ; in each instance, the general words embracing all other manors, &c. or all other manors, &c. comprised in certain deeds, &c. should be added.

Inaccuracies and errors in the names and quantities, and even omissions of parcels are so common, that it is prudent in most instances, in preparing deeds, to insert general words adapted to the case, so as to supply any such error or omission ; and whenever the deed warrants such insertion, it is proper to abstract these general words ; or at least to give an intimation, that there are general words in the deed, thus :  
*And all other manors, &c. which were purchased by from, &c.*

In subsequent deeds, it will be sufficient to refer to the premises generally, in these or the like terms : *All the parcels comprised in the abstracted indentures, dated the                      and days of                      or, all that the said manor of                      .* The said farm called                      ; the said close, called

But when any distinction is necessary, as is the case when various parcels of land are included, and it is material to distinguish some of them from others of them; then the more prominent feature of distinction is the *name*; and the reference should be to the name. But sometimes the quantity, the occupier, the local situation, or the like, is the distinguishing circumstance; and then the reference should be to that circumstance, as the said close, containing 10 acres, or the like.

To the general rule, that, in the abstract of the subsequent deeds after the first, the parcels may be referred to generally, or by a slight notice of them, the following exceptions should be made, and others of the like nature will fall under the same consideration.

1st, If the lands in question are a farm parcel of a manor, or a close parcel of a farm, and the manor or farm is the subject of description in the former deeds, then the description of the farm or close should be given at length, from the first deed in which the farm is separated from the manor, or the close from the farm, and

is fully described, instead of passing under a general denomination.

2dly. As often as there is any material variation in the description, either as to the name, the quantity, or the like, which can, by any construction, vary the effect of the deed, or elucidate the identity of the parcels, such variation should be shown. *As the said farm, &c. therein described as all that farm called* or heretofore called,

and now called ; or, as containing  
*acres; or, as in the parishes of*  
 &c. or, as in the occupation of  
 or, as having descended from to  
 ; or, as having been devised by  
 to

The former circumstances are more particularly important when they connect the modern description with the ancient description; and the latter circumstances are material only to show that the title has been acted on according to the former statement of the evidence, or these circumstances fill up a chasm in the evidence of the title; or afford notice of some circumstance which it may be proper to investigate.

It is too common to change the description of the parcels, by adapting them to the present state of the closes; or, to substitute for a general or comprehensive description, a more minute, detailed, and particular description.

There are various modes of accomplishing this object, when advisable.

Some gentlemen use the description as found in the ancient deeds, and afterwards add a new description, introduced by these or the like words: *Which said messuage, farm, lands, and hereditaments, are now better known by the description of, &c.*

Whenever this mode is adopted, it is highly expedient that a few words should be added, to embrace within the scope of the grant, all the closes, &c. which are known by the modern description, since, without this addition, the old description is the only substantial part of the deed, and no error in that description is cured, or inaccuracy supplied, by the superadded description.

The words of additional grant may be of this or the like import: *And all other the messuages, &c. which are hereinbefore mentioned, enumerated, or described by their present certainties or descriptions.*

Some gentlemen adopt a more eligible plan; they, in the first instance, describe the farms, closes, &c. by their modern description, and then add a reference, by way of showing their identity, and their connection with the ancient description.

In this mode the lands known by the new description are the subject of the grant; and the sole use of the reference to the ancient description, is to connect the deed which is preparing, with the more ancient evidences of the title.

It is always, however, a circumstance to be investigated, whether this application of the ancient description to the parcels which are purchased, is warranted by the fact.

On many occasions this averment is added, without sufficient evidence to justify it; and the title really depends on deeds or documents of title, of which no abstract is given.

Unless the facts imperiously call for an alteration in the description of the parcels, the more secure, and, for that reason, the more correct mode is to adhere strictly and closely, as far as circumstances will admit, to the description in the former deeds.

But in some cases, the description must necessarily be varied, and new denominations introduced; as when a particular farm is purchased, and it used to pass under the name, and as parcel of, the manor, &c.

With the exceptions which cases of this sort render necessary, the description of the parcels should never be varied.

When *allotments*, *exchanges*, &c. are made under *inclosure acts*, the lands received upon such allotment or exchange become subject to the title which attached and belonged to the lands, in respect of which, such allotments or exchanges were made; and the existence of such allotments or exchanges ought to be stated, in the order of the dates, and at the period when they took place.

From that period it is to be shown, that the

deeds, &c. are in terms comprehending these allotments.

The omission of parcels of this description most frequently occurs in deeds of assignment of attendant terms, special letters of administration, and the like. And in modern practice a few words are added in these and the like species of instruments, for the purpose of bringing within the operation of the deed or other instrument, the parcels of this description; of course, when relevant, these descriptive terms ought to be stated in the abstract.

It is to *allotments* and *exchanges* only under *acts* of parliament for inclosure, &c. that these observations are applicable.

The effect of one of these acts is to communicate to the lands received on allotment or exchange, the precise title which affected the property, in lieu of which the allotment or exchange was made.

In exchanges between individuals by way of conveyance, or even by an enabling act of parliament obtained for the sole purpose of exchange, no such identity of title is preserved or communicated. The title to the lands received in exchange, will depend on the deeds, &c. which concerned those lands prior to the exchange; and on account of the warranty annexed to such exchanges, whether made by private deeds between individuals, or through the medium of an act of parliament, the abstract ought to contain the history of the title, as well



to the lands given, as to the lands received, in exchange ; since there may be an eviction for want of a good title to the lands given in exchange, or the lands received in exchange.

A title of a still more complex nature, and of greater difficulty, exists, when a gentleman has many farms, held under different titles, and, on an inclosure act, he receives an allotment in lieu of all these lands, or of common rights, affecting all these lands ; or he purchases various allotments made to cottagers or other persons in small quantities, in respect of different tenements.

Under these and the like circumstances, to show a marketable title, there ought, in strictness, to be an abstract of the deeds, &c. containing the evidence applicable to each tenement, for which an allotment was made.

Supposing the allotment to be entire for many tenements, and the title to one of these tenements to be defective, the title to a part at least of the allotment will be equally defective ; and the inconvenience and incalculable mischief are, that no person can ascertain the particular part of the allotment which would be recovered on eviction by reason of this defect.

In some cases, titles, involving these circumstances, would be attended with more expense to put them in a marketable state, than the actual value of all the lands.

In one instance it was reasonably computed, that there must have been two hundred different abstracts, to show the real state of the title.

In another instance, a vendor abated twenty thousand out of sixty thousand pounds, rather than have the contract rescinded, on account of an objection insisting on this defect; and that since the lands were not ascertainable, the court could not decree performance with an abatement.

Transactions connected with the redemption of the *land tax*, sometimes also involve the title, with reference to the parcels, in great perplexity.

When the *land tax* is purchased by a particular tenant, and some of the lands are settled to one class of uses, and others to a different class of uses; and there is one entire contract for the redemption of the land tax; for example, when some of the lands are held in fee, and others for a particular estate, and there is one contract only for the purchase of the land tax of both estates; a title derived under a sale, made under the powers given by the land tax acts, will be defective.

It is obvious, that cases falling within these observations will require particular attention concerning the parcels.

In regard to inclosure acts, it would be convenient that general commissioners should be appointed, enabling them, at the instance of the parties interested, to make allotments distinctly, for lands held under *distinct titles*, or *distinct tenures*, so as to correct any errors or omissions of the commissioners acting under local acts.

And on redeeming the land tax, each contract should be for such lands only as are subject to the same uses, and there should be a power to commissioners, to correct mistakes made in this particular.

It has happened more than once, that an allotment under inclosure acts has been entire, and made in respect of some lands held for life; others held in tail, and others held in fee; and in the present state of the law, and in the absence of decisions, a title more perplexed, in respect of the parcels, cannot be easily conceived.

Whenever any doubt exists whether particular lands were the subject of deeds which granted lands in general terms; or by a description now grown obsolete, the relevancy of the former deeds ought, in a complete abstract, to be shown by means of cotemporaneous documents, as leases, assessments to the land tax, poor rates, &c. maps, stewards accounts, and the like.

That the present assessment to the land tax, or poor rates, as it applies to the lands actually purchased, can be traced back through the whole period of the abstract, without any material variation, will, in general, relieve the title from all doubt on the point of *identity*.

The advice to be given is, to compare the assessments at the distance of each period of ten years, unless grounds appear for abridging the period. This is a short mode of investigating the identity.

In stating the duty of the conveyancer, it will be proper to advert to those errors in the description of the parcels, which are, and those which are not, deemed material.

Another reason for disclosing a variation in the parcels, is, to enable the purchaser, or his counsel, to form an opinion, whether such variation can affect the validity of the title.

3dly, As often as the abstract is delivered with a view to a sale, or that deeds may be prepared from the abstract, the parcels should be stated at full length, from such of the deeds as are proper to be recited; especially the last purchase deed; and also, in the mortgage deed, or trust deed, if any conveyance is to be taken from the mortgagee or trustee; since mortgagees and trustees, frequently, with more caution than good reason, refuse to join in conveying by any other description than that which was introduced into the conveyance under which their title is derived.—See *Shepherd's Precedent of Precedents*, 160.

4thly. The description is sometimes given by terms of reference.

In these instances, the terms of reference should be stated fully, since they are of the essence of the description; and a mistake in them would, in many, indeed most cases, be fatal.

A mistake of this sort frequently occurs in the assignments of terms, made with reference to the deed, by which the lands were previously assigned to the present trustee, or the testator,

or, intestate ; and, on that point, the more material and relevant observations have already been offered.

And when the mistake destroys the essence of the description, so that there is a want of the certainty required by law, the error will no doubt vitiate the deed : but if a certainty exist, notwithstanding a mistake, as it does in the instance already stated of a correct recital, and a mistake in the reference to this recital, the deed would be supported, and have its operation.

Also when the grant is of a reversion or remainder, and the substance of the grant is, "all that the reversion or remainder, &c. expectant on, &c." these words should be set out at full length, since any error in the essential part of the description, would destroy the effect of the grant ; for example, if the reversion or remainder was described as expectant on the death of *A*, when in truth it was expectant on the death of *B*, then, as in point of fact, there was not any such reversion or remainder, the words of grant cannot have any application, and will for that reason fail of effect.

The mistake, however, of calling a remainder by the name of a reversion, or a reversion by the name of a remainder, is not material ; for a reversion may pass by the name of a remainder, or *è converso* ; as well as by its proper denomination.

*Of general words: exception, and the clauses of reversion, estate, deeds.*

WHEN the terms of description are of a general nature, as, ‘*all that farm called A,*’ so that a question may arise whether it extends to certain lands reputed to be parcel of the farm; and a reliance is placed on the clause of general words, granting “all messuages, &c. or all out-houses, closes, &c. parcel, &c. or reputed parcel; or held, used, occupied, &c.” this clause should be abstracted fully, as it may tend to remove doubts which otherwise might exist.

This is more particularly the case when a farm is enlarged by the addition of certain closes, which had formerly passed by certain names, and a distinct description; and this description is sunk in the general denomination of the farm, &c.; so that those particular lands cannot pass, otherwise than under the general denomination of the farm, or the general words, which embrace all closes, lands, &c. held with the farm, or reputed parcel, &c. thereof.

And sometimes it may be even necessary to add an abstract of old leases, or the like documents, to show that there has been *an unity* of occupation; and to give evidence, by affidavits, to support the fact, that the closes have been deemed parcel of the farm.

Some observations have already been offered

on the subject of general words, containing the clause commonly called *the sweeping clause*.

This clause should be added as often as any aid can be derived from it ; so as to remove a difficulty respecting the parcels, as that difficulty may arise, either from an error in the description, or from a want of sufficient identity ; or from any other cause which raises a question of defect, which may be supplied by such general words.

But in a well prepared abstract, no more parcels should be introduced than those which are materially relevant to the title to be considered ; and if one abstract be made for the use of divers purchasers, the parcels which are purchased by such purchasers respectively, or by the purchaser for whose use the particular abstract is delivered, should be pointed out by marginal observation, or by some other notice ; and this observation is equally applicable to each deed, &c.

In abstracting clauses which contain general words, the attention should not be drawn to more parishes, townships, &c. or other terms in the deeds, than are relevant to the parcels, as to which the title is under consideration ; for example, when the abstract concerns lands in Tunstall only, the form should be, "*And all manors, &c. messuages, farms, lands and hereditaments, in several parishes and places therein mentioned, and amongst them Tunstall.*"

It would be a great accommodation to the conveyancer, and promote the dispatch of business, that this observation should receive attention, and be introduced into general practice; and the practice should be extended to all similar cases to which the observation can be applied. Nothing displays more attention, or more skill on the part of the solicitor.

And in this place it may be properly noticed, that in preparing deeds of extensive property, with general words, either naming the several *occupiers* or *tenants*, or the *townships* or *parishes* in which the lands are situate, it is usual, with gentlemen whose experience has taught them the value and utility of such arrangement, to name the occupiers, the tenants, the townships, the parishes, &c. &c. in *alphabetical order*. And the adoption of this practice cannot be too strongly recommended.

*The exception* also, if any, in the deed, out of the parcels, should be noticed, as far as it is relevant to the parcels to which the abstract relates.

The clause of the *reversion*, unless it contains special matter, as the apportionment of rent, or the like, ought to be noticed only by a short reference, in these or the like terms, '*and the reversion,*' &c.

The like observation is equally applicable to the clause of '*all the estate,*' with the exception, however, that if from any error in the habenda-



dum, the estate is not well limited by that clause, and consequently the clause of all the estate may be the efficient and operative clause of limitation, the language of this clause should be fully detailed. See *Jermyn v. Orchard*, Show. Parl. Cases, p. 199.

But although the clause of 'all the estate' import to grant all the time or ownership which is in the grantor, yet it is now, in opposition to the current of the earlier authorities, decided, that this clause does not exclude the power of the *habendum* to give a partial interest by way of *underlease*: for the effect of the grant and *habendum*, collectively taken, are to demise the land and all the estate, for a term of years, so that there is not any repugnancy or inconsistency. See *Earl of Derby v. Taylor*, 1 East Reports, 502. The point decided in this case, differs from the long and much controverted point, raised in *Jermyn v. Orchard*.

In the latter case the *habendum* was void, and the court would not suffer a void *habendum* to defeat a grant which was complete. In that case a term was granted. *Habendum* from and after the death of *Thomas Nicholas*. This *habendum*, for a reason purely technical, and which merits reconsideration, could not operate; and as there was a grant of the *recited lease*, the court decided that the *habendum* might be rejected, and the granting words retained, *Ut res majis valeat, quam pereat*.

The clause granting all deeds, &c. should also be noticed only by a short reference in this or the like form, *And all deeds, &c.*

### *Of the Habendum.*

WHEN the habendum is correctly prepared, it has words of reference to the parcels, and names the grantee, and limits the estate.

Supposing the habendum to be correct, the common practice, in reference to the parcels, is to give the effect of the habendum thus, *To hold the same unto, &c.* But as often as the habendum is inartificially penned, by omitting some of the parcels in the enumeration, or reference to them, this variation should be noticed.

Sometimes also there are *different clauses of habendum.*

In these and the like instances the parcels enumerated in the different clauses should be specified, so as to show that the terms of reference are correct, and what are the operations of the different clauses.

Sometimes also one person is named as the grantee in the premises, and another in the habendum. In general the grant will operate, and the habendum be rejected.

But under circumstances, as already noticed, the habendum may be retained, and the name in the grant rejected; as where a lease was to *A*, and the release to *B*; habendum to *A*; under these and other circumstances, which manifested an intention that *A* should be the grantee, the

grant in the premises was held inoperative, and the habendum was allowed to be effectual.

So when a feoffment is made, the livery would probably determine the operation ; for example, the charter has a grant to *A*, habendum to *B*: If livery be made to *A*, he would be deemed the grantee. On the other hand, livery to *B* would determine the courts to decide that the deed and livery were an effectual conveyance to *B*.

In the case of *Spyve v. Topham*, 3 East 115, the difficulty was to reject the grant, and to retain the habendum. Had the grant been correct, and the habendum repugnant, there would not have been any difficulty ; for it is established by many authorities, that when there are two clauses in a deed, and one of them is repugnant, the latter shall be rejected : also that a grant may be good without an habendum, so that upon a substantive case of a grant to *A* and his heirs, habendum to *B* and his heirs, independent of other circumstances, the grant would be retained, and the habendum rejected. In a case which occurred in practice the grant was to *K. and H.* and their heirs, habendum to *Cross* and his heirs. So that on the general rule the habendum, and not the grant, was to be rejected ; the livery also was made to *K. and H.*, and this circumstance showed they were, in point of intention, to be the grantees : for livery, it is to be observed, is the essential part of a feoffment. Had the livery been made to *Cross*, instead of *K. and H.*, that circumstance would have

brought the case within the reason of *Spyce v. Topham*, and have determined the construction of the deed, by leading to the conclusion, that it amounted to a grant to Cross and his heirs. As in effect the grant was to K. and H. and their heirs, to uses, the habendum to Cross was rejected: thus the uses arose from the seisin which passed to K. and H.

In this part also of the abstract the name of the grantee or grantees should be added: and when there are any words of modification, *severing the tenancy*, these words should be faithfully abstracted, or rather transcribed.

The words of limitation also should be faithfully given, and rather fully than concisely.

And as a deed, operating under the rules of the common law, may be void, because it limits an estate of freehold, to commence in futuro, the words which suspend the limitation or operation of the grant, *quo ad* the estate, by limiting the same to commence at a future time, should be added.

Let it be remembered, that an use or a trust, or a term of years, or a rent, on its creation *de novo*, may be limited to commence in futuro. [Essay on Estates, ch. Freehold.]

In a note by Mr. Powell to his edition of *Wood's Conveyancing*, the law, as it regards the learning on the habendum, is given with great accuracy, and in a very neat and compressed form, and is deserving of particular attention.

Connected with this subject, and belonging to it, is the important learning of remainders, of contingent remainders, and the various consequences to which contingent remainders are subject.

- Remainders are in abstracts generally introduced by that *word*, unless the remainders are limited by *words of contingency*.

The abstract should always state the words of contingency by which contingent remainders are limited.

- There is scarcely any learning connected with the forms of deeds which requires more attention than that which concerns *the description of the parcels*, the rules regarding the exception of parcels, and the *repugnancy* between the grant and the habendum.

In detailing the duties of the conveyancer an attempt will be made to collect the rules of law applicable to these several heads.

### *Of the Reddendum.*

THIS clause should be stated very briefly, except in two cases, viz.

1st. Where the rent is reserved in some particular manner, and a question may be raised on the validity of the reservation.

2ndly. Where the rent is the subject of the title to be considered, and the deed is abstracted for the purpose of showing the creation of the rent.

In these and the like cases the abstract should be full, so as to give all the particulars which may be material.

With these exceptions it is sufficient to show the quantum of rent, and the stated times of payment; and also, if such be the fact, that the rent is to be clear of deductions for *land tax*, or of all deductions generally.

### *Of the Declaration of Uses.*

As often as a conveyance is made to a man and his heirs, to the use of him and his heirs, so that, in effect, he takes by the rules of the common law, and the declaration of use has no other effect than to exclude a resulting use, the limitation of the estate, and the expression of the use, are in abstracts consolidated into this form, To hold the same, &c. *unto and to the use of the said A. B. and his heirs.*

This mode of abstract is also observed in application to freeholds for lives, when the expression of the use is a mere echo of the limitation of the estate, for in assignments of estates for lives to a purchaser; or trustees, who are to retain the estate, the grant, or rather the assignment, is generally made to and to the use of the grantees during the lives.

But observe, that when the grant or assignment is to and to the use of the grantee, no further uses to be executed by the statute are admissible. Of course, when the uses are to be declared to govern the legal estate, there

should be a simple grant to the grantee, his heirs, &c. to the intended uses: and the abstract of a deed, so penned, should show the uses, as distinct from the legal seisin.

*A*, tenant for life, made a grant, with livery, to *A*, and to his heirs, habendum to *A*, and his heirs, to the use of *A*, and his heirs, for the life of *A*.

On these facts a question arose whether there was a forfeiture. It was attempted to support the conveyance as a grant for life only, and therefore as exempt from the right by forfeiture. The ground taken was, that the grant and the use were parts of the same limitation, so that, in effect, there was a grant only for the life of *A*; but it was decided, that the grant was distinct from the use, and that the grant with livery passed the whole fee; and that the forfeiture was not saved by confining the limitation of the use, which was a distinct clause, to the period of the life of *A*.

This mischief would have been avoided had the habendum been to and to the use of the grantee and his heirs for the life of *A*.; for in this mode the use would have formed part of the limitation of the legal estate.

A like error sometimes occurs in levying a fine *sur concesserunt* in fee, or *sur conuzance de droit come ceo*, &c. when the *conuzor* has merely an estate of freehold. It is in vain that the deed of uses treats the *conuzor* as tenant for

life ; for though to some purposes, the fine and deed of uses are parts of the same assurance, there is not any reason to expect that the rule would be applied to a case of this description.

And yet where a grant was made to a man and his heirs, habendum to him and his heirs, to the use of the heirs of his body, the court held the habendum and the use to be part of the same limitation.

As often as the declaration of use is to operate distinctly, through the medium of the statute of uses, it governs the legal title, and the uses should be given fully, at least so far that the precise state of the title may be collected from them.

As titles more frequently turn on limitations of use than on any other part of the deed, it will be right to consider this part of the abstract with particular attention, and to give some directions, by means of which abstracts may be prepared with accuracy.

These observations are equally applicable also to limitations of use in wills, and for that reason should be read as equally referrible to them.

In every limitation of use four circumstances are to be considered ;

1st. The time at which, and the circumstances under which, the use is to arise.

2dly, The person in whose favor the use is limited.

3dly, The duration of the estate, as expressed in the limitation.



4thly, The words of modification, which regulate the order, or manner of the enjoyment.

The time at which an use, or estate is to commence, is for the most part expressed in the words by which the limitation is introduced.

This is more particularly the case, in introducing limitations by way of remainder, and on the creation of future springing, or shifting uses.

In deeds to operate by the rules of the common law, a grant of an estate to commence in future, is void, because it places the freehold in abeyance.

But in wills, under the learning of executory devises, and in conveyances to uses, under the learning of springing uses, the estate may commence from a future day, or from a given event: so as such event fall within the rule prescribed against perpetuities.

The language which expresses this future use or estate, and also the language which limits a contingent remainder, should be fully and faithfully abstracted ; and the more special are the words by which the limitation is introduced, the more full and correct should be the statement of these words. Clauses which are expressed in a special manner, or which have a more than ordinary portion of language to denote the intention, require to be particularly detailed. The construction must be made on the whole clause, and the intention collected from, and consequently the rules of law be applied to, every part of the clause.

Future uses are denominated from the circumstance, that they give interests to arise at a future time, or on an event ; and when they are to arise on an event, or contingency, they fall under the denomination of contingent uses, and, in some cases, contingent remainders.

But sometimes there may be a future use, which is neither a remainder or contingency, as in a conveyance to *A* and his heirs, to the use of *B*, and his heirs, from and after the 29th day of next September. This use is not contingent, nor is it a remainder : it is a future or springing use. No use will arise till the limited period ; and in the mean time the use of the fee will result, so that the original settler or grantor has a fee determinable when this future use shall give a vested estate.

Such future use, while it remains in its executory state, is devisable, or may be released, or may be bound by estoppel, or may be extinguished, or may be the subject of a contract, or agreement in equity : but an interest, under a future use, while it remains executory, cannot be transferred by a common law conveyance.

Besides, when the first use is future, all the other uses depending on the same, are, except in very particular cases, arising from special regulations, also future.

Hence the importance of stating all circumstances which may afford any information respecting the nature of the use, and the contingencies on which it depends.

Also, whether a remainder is to be deemed vested or contingent, must depend on the language or terms in which that limitation is penned, or the object in whose favor the use is expressed.

An use may be contingent from various causes ;

1st, Because it is limited expressly *on an event which may or may not happen*, as the death of *A*, in the life-time of *B* ; or the *payment of a sum before a given day* ; or the *payment of a sum by B* ; since it is uncertain whether he ever will pay. And here note that if the payment is to be *by B. or his heirs*, there must be a limited time, or the use depending on this contingency will be too remote, since the payment may not be made within the period prescribed by the rule against perpetuities.

So an interest to commence from *the return of C. from Rome*, is contingent, for he never may return.

In short, an interest is contingent as often as in terms, or in construction of law, it is limited to commence from an event which may or may not happen. Also an interest may be contingent, because it is limited to commence at a time (as the death of *B*), which, though it necessarily must happen, will not certainly happen during the continuance of a particular estate, for the life of some other person than *B*.

Thus, if *A* be tenant for his own life, and a remainder is limited to *C*, from and after the

death of *B*, this remainder is contingent, because *A* may die in the life-time of *B*; in other words, the particular estate may determine before the remainder is capable of vesting.

So if *A* be tenant for his life, and a remainder is limited to *C* from and after the deaths of *A* and *B*, the remainder is, for the same reason, contingent, because *A* may die in the life-time of *B*, and the remainder of *C* cannot, consistently with the language of the gift, take effect, as a vested interest, until the death of *B*. In short, the remainder will be void if *A* should die in *B*'s life-time.

These conclusions arise from a rule of law, that a remainder must vest during the continuance of the particular estate, or *eo instante*, that it determines, or the remainder will fail of effect.

These are contingencies, therefore, by implication of law, arising from the nature of the limitations, and their legal operation.

These gifts are not contingent in themselves. They are only contingent with reference to the law on remainders, that *B* must die in the life-time of *A*, to gift effect to the remainder.

This shows the necessity of distinguishing accurately between a remainder and a springing or future use. For if lands be conveyed to *A* in fee, with a substantive independent use to *C*, after the death of *B*, this is a future but not a contingent use. It is future, because it is to wait for effect until the death of *B*; but it is not contingent, because *B* will certainly die;

and the future use will, in construction of law, certainly take effect on his death.

And there would not be any inaccuracy in treating this as a contingent use ; since, in point of law, it depends on the contingency that it shall not be released or destroyed before it can take effect ; and all that is necessary is to distinguish it from contingent uses being remainders, as far as such contingent remainders are subject to be destroyed by the determination, tortious alienation, surrender, merger, or forfeiture of the particular estate.

But every interest, which is limited to commence, and is capable of commencing, on the regular determination of the prior particular estate, at whatever time the particular estate may determine, is, in point of law, a vested estate : and the universal criterion for distinguishing a contingent interest from a vested estate, is, that a contingent interest cannot take effect immediately, even though the former estate were determined ; while a vested estate may take effect immediately, whenever the particular estate shall determine.

Hence it often happens that a limitation, expressed in words of contingency, is, in law, treated as a vested estate.

The obvious examples are, To the use of *A* for life, and if *A* shall die in the life-time of *B*, to the use of *B* for his own life. In this instance the estate of *B* is vested. The reason of this particular case is, that no more is expressed

than is implied by law, since he could never take in the order of limitation, unless *A* should die in his life-time. The rule which governs this case is *expressio eorum quæ tacite insunt nihil operatur*. But if the limitation to *B* had been to him for years, or for the life of *C*, or in tail, the rule would not have been applicable, and of consequence, the remainder would have been contingent.

On a recent occasion a curious question calling for the application of this rule arose. Lands were limited to *A* for life; and if *A* should die in the life-time of *B*, his intended wife, to the use of the wife for life; and after the death of the survivor of *A* and *B* to the use of the heirs of the body of *B*, to be begotten by *A*. A gentleman of great eminence and experience considered *B* as simply tenant in tail, and her interest *as contingent*. He construed the several limitations as if an estate tail had been given by one entire clause. On the other hand, it was contended, that the several limitations were to be construed separately and distinctly, so that *B* had a vested estate of freehold, which connected itself with, and drew to itself, under the rule in Shelley's case, the benefit of the limitation to the heirs of the body of the wife, as a vested estate tail. No decision has been obtained on a case thus circumstanced.

Also, if an estate be limited to the use of *A*, and the heirs of his body, or is devised to *A* and his heirs, and if *A* shall die without heirs

of his body, or issue of his body to *B*, though these words express a contingency, they do not suspend the vesting of the limitation in remainder. They merely designate the time at which the remainder is to commence in possession. The consequence is, that the remainder is vested, since it may take effect on the determination of the particular estate, at whatever time that estate shall determine. But if the limitation over had been introduced by these or the like words: If *A* shall die without issue in the life-time of *B*; or if any other contingency had been expressed, unconnected with the actual determination of the prior estate, then the remainder would have been contingent.

In some instances a limitation over may cause a prior gift to vest the interest, while, without such limitation over, the gift would have given a contingent interest.

Thus, a gift to *A* and his heirs, at his age of *twenty-one years*, or when he shall attain that age, gives a contingent interest. [*Grant's case*, 10 Rep. 50.]

But a limitation over, or substitution, in case *A* should die under twenty-one, would give to the former limitation the construction and consequent effect of passing a vested interest, [*Edwards v. Hammond*, 2 Show. 398. 3 Lev. 132. *Doe v. Nowell*, 1 Maule and Selwyn, 327. *Broomfield v. Crowder*, 1 New Rep. 313.]

In this place also, it is to be observed, that a more remote remainder may be vested, although

*a more immediate remainder by way of particular estate is contingent*, provided the estate of freehold on which it is made to depend, is limited by way of present estate, so as to confer a vested interest.

When a remainder in fee is limited on a contingency, then all subsequent limitations by way of alternate, or substituted, remainders, must necessarily be contingent.

So if one limitation is too remote, all other limitations by way of remainder must necessarily be too remote.

But in wills, or conveyances to uses, a subsequent clause may introduce a vested estate, to fill up the chasm or interval during which there is to be any suspense or abeyance. Residuary clauses in wills frequently give a vested remainder, to remain in force, until defeated by the vesting of a contingent remainder in fee; and it is observable, that this remainder passes to the devisee, and in most instances, under general words, instead of descending to the heir.

This remainder is immediately expectant on the particular estate; and yet the contingent limitation operates as a remainder, and may be destroyed; at least, such is the opinion which obtains in practice, while the residuary devisee has the like interest as the heir would have taken, if this reversionary interest had not been devised.

This is a peculiarity in law, introduced by



the learning of wills, and of uses; namely of a particular estate, and a remainder in fee, and the remainder in fee liable to be divested by another estate, though a fee, to operate as a remainder. Another peculiarity is, the operation of the contingent interest, as a remainder, and not as a shifting use, or executory devise, and its liability to destruction as a contingent remainder.

Remainders also may be contingent, because they are limited to a person unborn, as to the first son of *A*, who has not any son; or because the person is not ascertained as the survivor of several persons; or the heirs, as purchasers, of a person who is in being.

In short, to simplify the idea of a contingent remainder, it is better to say generally, it is a remainder, to take effect on an event which may not happen; and to add, that a remainder may be contingent from either of two causes:

1st. Because it is to take effect on an event which is expressed.

2dly. Because it is to take effect on an event implied by law.

Under the first class may be ranked all remainders which are limited by words of contingency; as,

1st. To *A* for life; and if he should die under twenty-one, to *B*.

2dly. To *A* till he should return from Rome, and after his return to *B*.

By way of contrast to a former case, observe, that the words "till he shall return from Rome," form the measure of the estate, and not, as in that instance, raise the question, whether the first gift is or is not on a contingency. Thus two cases, apparently similar, are, in reality, different. At the same time it is a notorious fact, that the case of *Hammond v. Edwards*, and the other decisions of that class, are considered as cases *sui generis*; as *decisions*, which proceeded from refinement, to support gifts, under circumstances of apparent hardship, rather than from established rules.

Under the second class may be ranked all estates which are limited;

1st. To a person *not ascertained*.

2dly, To a person *not in being*.

3dly, To those who have *no present capacity*, as a corporation during the vacancy of a mayor, &c. Or which may fail of effect, because the particular estate may determine before the remainder can commence; as,

1st. To *A* for life, and after the death of *B* to *C*.

2dly, To *A* for life, and after the death of *A* and *B* to *C*.

Or which are to take place only in case a fee, previously limited on a contingency, shall not vest.

These observations demonstrate of how much importance it is that the abstract should be full and correct, in stating all words which may

raise the question, whether an estate is vested or contingent.

Except in special cases, falling within the scope of the observations already made, the common form of abstracting deeds is sufficiently correct; thus to *A* for life, remainder to *B* in tail.

Constrasted with remainders, are limitations *by shifting use*, and some species of *executory devise*.

It is the nature and essential property of a remainder, to take effect upon and after the regular and proper determination of a prior particular estate.

Remainders owe their operation and effect to the rules of the common law.

A remainder would be void if it aimed at the determination or avoidance of the particular estate, before it had completed the measure of its time.

So a remainder would be void if it left any interval between the determination of the particular estate, and the commencement of the remainder: as in the example of a gift to *A* for life, and from and after the death of *A* and one day, (without limiting any estate for that day), then to *B*. As *B* is to wait for the expiration of the day, the remainder is void.

But a limitation by executory devise, or by shifting use, may be good, although it is to defeat the particular estate, or a prior fee, wholly or in part; or is to leave an interval between

the determination of the particular estate, and the commencement of the estate which is next limited.

Clauses *for shifting the* estate from one branch of the family to another ; and all conditional limitations by executory devise, and shifting use, and all estates arising from the execution of powers, operate either by way of executory devise, or of shifting use.

On these important topics it will be necessary to enlarge in a future page.

*Of the person to whom the limitation is made.*

All that is necessary to be observed on this head is, that the abstract should give the description of the person in the same terms as this description occurs in the deeds.

This is more particularly important when the person who is to take is designated by special terms ; as the children of *A* living at his death, the first-born son of *A* who shall attain twenty-one, or the like.

In all these and the like instances, every part of the description is material, and should be given at large ; and the more special the circumstances of description may be, the more incumbent it is on the solicitors to take care, and for the conveyancer to require, that the abstract should contain a full and faithful transcript of this part of the deed.

Sometimes also the construction of the words of express limitation is influenced by the context of the deed or will, and more particularly

by the clause introducing the limitation in question, or by the clause which introduces the next estate, or by some proviso of shifting or springing use. Each such clause, as often as it can materially vary the construction, should also be given at length.

*Of the duration of the estate.*

The duration is marked sometimes by the terms which are descriptive of the persons who are to take as the *heirs of the body*, when these words are used as words of purchase. At other times by words of *superadded limitation*, as to the *heirs of the body, and the heirs female of their bodies*, or the like, or to the first son, and the *heirs male, or heirs of his body, &c.*

In abstracting words of limitation, marking the duration of the estate, it is very common in practice to give their effect, instead of stating the terms of the deed; thus, 'to *A* for life, remainder to *B* in tail; remainders to the first and other sons of *B* successively in tail, remainders to the daughters of *A* in tail, with cross-remainders between them in tail, with remainder to *A* in fee.'

Nor is there any decisive objection against this practice, when the construction, and consequent effect of a deed, are so clear and indisputable that no doubt can exist on the effect. But when a deed or will is abstracted in this mode, it is particularly incumbent on the solicitor for the purchaser to take care that the effect of the limitation is correctly given in the abstract.

And it is always more satisfactory to the conveyancer to have the words of limitation, that he may judge of their operation, and draw the conclusion for himself: and counsel, however irksome it may be to him ; and it is truly irksome, should require the language of the deed, will, &c. to be set forth, whenever he has reason from the structure, the form, or the language of the abstract, to suspect the competency of the solicitor to give a correct statement of the effect of the deed or will.

There are a few points falling under this head which deserve to be particularly noticed, since abstracts are, in these particulars, frequently made without sufficient attention to accuracy.

1st, The use, and the estate to serve the use, are sometimes blended by mistake. A conveyance is stated to be '*to and to the use of A in fee, to uses, &c.*' while, in fact, the deed is correct, and the conveyance is made *to A in fee to uses* ; so that the uses are executed by the statute for transferring uses into possession, and not exposed to the objection of being uses on an use in *A*, and, for that reason, trusts in the second degree, on which the statute cannot operate.

2dly, In abstracting marriage settlements, it is not an uncommon mistake to distribute part of the clause, expressive of the use, to the limitation of the legal estate.

Thus the habendum is stated to be *to A and his heirs from and after the marriage* ; thus in-

corporating part of the use, limiting the estate to the settler and his heirs till marriage.

A common law conveyance, which suspended its operation till the marriage, would be void, as limiting an estate of freehold to commence *in futuro*, and as placing the *freehold in abeyance*. [Essay on Estates, ch. Freeholds.]

This inaccuracy should be avoided ; the form may be to *A* and his heirs ; *To uses, to take effect after the solemnization of the marriage*, viz. &c. then stating the uses.

Even this form would not provoke inquiry, since the limitations would be good, as future springing uses, even though there were an omission of the usual limitation to the settler, and his heirs, or uses to the like effect.

But as often as the limitation of an use till marriage is inserted, the correct form of the abstract will be,

*To the use of B and his heirs till the marriage*, and after the solemnization of the marriage.

Then,

*To the use of, &c. &c.*

Some gentlemen state the uses thus ; ‘ to *A*, till the marriage, *remainder* to the use of,’ &c.

Every person understands the sense of the word remainder thus used. It is, however, in a technical sense, inaccurate. For the limitations after marriage are not remainders. They are to operate by way of shifting use, as a substitution for the fee limited to the settler till marriage, should that fee cease by the marriage.

3dly, In various instances, though the will depends on a power which has defeated all the uses and trusts, yet the uses and trusts are stated as if they were relevant to the history and deduction of the title.

So many of them only as may show the right to exercise the power, are necessarily, or indeed properly, stated, when the title is rested on the power, and the appointment exercising the power.

But when the sale, or appointment under the power, has been questioned, or its validity is doubtful ; or when there has been a confirmation by the persons who would have been entitled, in the event that the power had not been exercised ; then the ulterior uses, as far as they are relevant to the title, are, with great propriety, to be inserted in the abstract.

So when there is a power of appointment, and limitations over in default of appointment, and the title has been completed under the power ; it is not, except under such circumstances as are already noticed, necessary to state more of the ulterior uses, than give estates or interests to the person or persons under whose appointment the title is derived.

4thly, It is common to say, ‘with remainder to trustees for supporting contingent remainders ; or remainder to trustees and their heirs for supporting contingent remainders ;’ this particularly when the limitations are of legal estates, suggests an inquiry, whether the fee



may not be vested in the trustees. See *Doe v. Morris*, 7 Term Reports. *Compere v. Hicks*, ib. and consequently the ulterior interests are not merely equitable, instead of being legal interests.

As often as the fact will warrant it, it should be shown that the limitation is to the trustees, and *their heirs during the life, &c.* Or, if the omission of the words *during life, &c.* be in the deed itself, the abstract should be so given by marks of quotation, or with a marginal observation, showing that there is such an omission in the deed; or the ulterior limitations should be stated, if there be any, from which it may be collected, that by the context of the instrument, and the construction of law, the former limitation is merely for life, as by a repetition of a like limitation to the same trustees, as in *Doe v. Hicks*, 7 Term Reports 433; or by the limitation to them of a term of years, as in *Curtis v. Price*, 12 Vesey, 89.

In these instances the subsequent limitation showed the intent, so that the former estate must, in order to preserve consistency, be merely for life. See *Shapland v. Smith*, 1 Bro. C.C. 75.

5thly. In abstracting the limitation to the first and other sons, &c. or to daughters, the clause is expressed as a limitation to them and their heirs male, or to them and their heirs, when in point of fact, there are, either in terms; or in construction of law, *words of procreation*, descriptive of the body from which these heirs

are to proceed so as to convert the words of limitation into an estate tail.

Such words, whether they are contained in an express limitation, or in words introduced into the limitation over, ought to be stated. On the other hand, if the defect in this particular, exist in the deed, it should be noticed in like manner as in the limitation to trustees for supporting contingent remainders.

6thly. Even when a limitation over has special terms, which have the effect to abridge the import of words of limitation in a former clause; or to suspend by words of contingency the vesting of the remainder; it is common, in abstracts prepared without sufficient skill, to give the limitation over, by saying '*remainder to*;' This is inaccurate, as it does not disclose the real state of the title; either as to the words of qualification, or the words of contingency; and in either case, if the limitation be material to the title, it necessarily leads to an inquiry for a correct statement of the deed, and produces delay, and a great increase of trouble and expense.

#### *Of the Words of Modification.*

THESE are words which sever the tenancy, by declaring that two or more persons shall hold as *tenants in common*; or that several persons shall take *successively, according to the priority of their births, or, in the order in which*

*they are named*, or, that daughters or children shall have cross-remainders.

These clauses should appear on the abstract, so far at least as to show their effect : and as often as the words are special, and may admit of a doubt on their construction, the abstract should be full in this particular.

*Further observations on words limiting the estate.*

In abstracting deeds and wills, &c. which have a long series of limitations to different persons for their respective lives, with remainder, after the death of each person, to his first and other sons, &c. in tail, several courses are observed.

Some gentlemen abstract all the limitations, and this is right, as often as the title may be aided under some of the more remote limitations ; or it depends on them, by reason of the failure of the prior estates.

Other gentlemen are content with giving the limitations, as far as they are material, to the title ; and this is the more scientific mode of preparing the abstract. For instance, if *A* be tenant for life, with remainder to *B* in tail, with divers remainders over, and the title depends on a common recovery, duly suffered by *B*, so that he has barred the estate tail, and the remainders dependent on the same, they are satisfied with stating the title, so as to show the creation of this estate tail, and noticing that there were divers remainders over.

This mode saves a considerable portion of trouble to the conveyancer, by confining his attention to this estate tail, as the foundation of the subsequent title.

When a title depends on a very remote estate tail, or a remainder in fee, the abstract is sometimes given shortly to this or the like effect, '*after divers particular estates for life, and in tail, which are determined, to A in tail, or to A in fee.*'

There is not any great objection to this form of abstract, when the limitations in question are contained in ancient deeds, and the title has for a long series of years, been held under this remote estate tail, or remainder in fee. But in abstracting deeds of a modern date, and all deeds executed within the last sixty years seem, for this purpose, to fall under this description, the prior limitations should be shown, that the purchaser may satisfy himself of the fact, that the estates given by the prior limitations are determined, and that they were determined before such time, as it may be material to consider them as determined, namely, before a recovery was suffered, &c. and that no fines were levied, recoveries suffered, or encumbrances created, which can affect the title.

There is one instance, however, in which all or many of the limitations ought to appear in detail; and there may be other instances of a similar nature, though they do not occur to the mind at present. The instance in contempla-

tion, is of an act of parliament obtained for the sale of estates, or for their exchange, &c.

All the limitations should be introduced, or so many at the least as will show the application of the *saving clause*.

The recitals in the act of parliament will, in general, afford a clue for deciding on the limitations to be abstracted.

At this point it is in course to consider the difference between limitations in deeds, operating wholly by the rules of the common law, and deeds operating under the learning of uses, or partly under that learning.

1st, By the rules of the common law every remainder must be preceded by a particular estate.

2dly, When a contingent remainder is limited, the particular estate must be of freehold at least; or if there be an estate for years, it must be followed by an estate of freehold; so that such estate of freehold may precede the contingent remainder; thus, if the intention be to give an estate of freehold or inheritance on an express contingency; or to a person not in existence; or to a person not *ascertained*, it is essentially necessary that there should be a prior limitation to a person who may receive an estate of freehold as a vested interest. And this rule equally extends to assurances perfected by livery of seisin, and to deeds operating merely as grants.

These rules proceed from the anxiety of the law to prevent the abeyance of the freehold; and

the learning on the subject, with its consequences, and the rules deducible from the same learning, will be found in the Essay on Estates, Chapter on Freeholds.

These rules are,

1st, The freehold cannot be in abeyance.

2dly, The inheritance or an estate of freehold, expectant on an estate of freehold, may be in abeyance.

3dly, An estate of freehold or of inheritance, limited by way of contingent remainder, must vest during the prior particular estate created by the same instrument, or *eo instante* that it determines.

4thly, Such estate must continue either as an *estate*, or as a *right of entry*, and not merely as a *right of action*; and hence the deductions and consequences that a contingent remainder may be destroyed, unless it vest before the particular estate has been destroyed by *tortious alienation*, as by feoffment, fine, or recovery; or before it has been defeated by *forfeiture*, *surrender*, or by *merger*.

These rules, however, are applicable only to limitations of *the legal estate*: for limitations of *trust* cannot be destroyed by the alienation of the particular tenant, or by the surrender, merger, or determination of his estate. And estates of *copyhold tenure* cannot be destroyed by any act of the particular tenant: but the better opinion is, that a contingent remainder of copyhold lands may fail of effect, by reason of the

determination of the prior particular estates, before the remainder can vest in interest.

The rule applies to all legal estates bearing the relation to each other of a particular estate, and a remainder, without regarding whether they are created by limitation in deeds operating by the rules of the common law, or by limitations of use giving legal remainders ; or by limitations in a will giving remainders of the same description.

Other propositions flow from the same rules ;

1st, At the common law a fee cannot be mounted on a fee ; or as the rule is differently expressed, one fee cannot be limited after and expectant on another fee ; or to take effect, on any event, or condition by which the prior fee is to be determined or defeated ; but even at the common law *one fee may be limited as a substitution for another fee*, in the event that such remainder should never give a vested interest. Each remainder will, in its inception, be contingent, and as such be liable to destruction.

2dly, Every remainder must be limited, so that it may have the capacity of taking effect on the determination, whenever that determination may take place, of the prior estates : for, as already noticed, a limitation which is made with an interval between the particular estate, and the remainder, will be void.

Thus, a grant to *A* for life, and from and after the death of *A* and one day, one week,

and one year, to *B*, then to *C* in fee, will not be good, as far as the gift is in favor of *B*; since the form of the limitation precludes him from taking the possession immediately on the death of *A*; which is the regular and proper determination of the particular estate: but a gift to *A* for life, and from and after the death of *A* and *B*, then to *C*, is not open to this objection. The remainder is contingent, because it is not necessarily to take effect in possession, whenever the possession shall be vacant; but it is not necessarily void, because by the death of *B* during the particular estate, it would be capable of taking effect on the regular determination of the particular estate. In the former example, the limitation expressly excludes the remainder-man from enjoyment for a time beyond the determination of the particular estate, while in the latter instance there is merely a possibility that there may be an interval; and the law has provided for the case, by treating the remainder as contingent, so that it may vest or fail of effect, as the event may arise. It excludes the remainder from being vested, since as a vested remainder it would, contrary to the intention of suspending the right to the possession till the death of the survivor of two persons, have the capacity of taking effect in possession on the determination of the prior estate, although that estate should determine while one of these two persons should be alive.

3dly, A remainder cannot be limited to com-



mence on an *illegal act*, as by murder, &c. And,

4thly, It is said that a remainder cannot take effect upon what the law calls a double possibility; or a *possibility on a possibility*.

The cases given in illustration of this branch are better understood by referring them to some ground which is more intelligible. The examples are of a gift to *A* for life, with remainder to a corporation, when, in point of fact, no such corporation exists; or a gift to *A* for life, remainder to the first son of *B*, while no such person as *B* is in existence, or known.

These cases may be easily accounted for on principles of law, without resorting to the quaint and unintelligible terms of a possibility on a possibility.

The true ground of these cases seems to be, that,

1st, The gift to a corporation, while in fact no such corporation exists; or a gift to a person *tanquam in esse*; or to the first son of a person *tanquam in esse*; while in point of fact no such person is in being, is void for want of capacity or uncertainty.

Suppose the gift to be to *A* for her life, and after her death then to such son, to be baptized by the name of *C*, as *B* shall have by a woman whom he shall marry, and who shall, at her marriage, be called by the name of *C*: in this instance there is a treble contingency.

1st, There must be a marriage with a woman of a particular name.

2dly, She must have a son of the marriage.

3dly, The son must be baptized by a particular name.

And yet no lawyer would hesitate to admit the validity of a remainder in these terms.

Of course the cases of possibility on possibility must be understood as confined to instances in which the remainder is void, either from the *uncertainty* of the person who is to take, or from the gift being to persons particularly designated, while, in point of fact, there is not any person answering that description.

The rules of tenure do not apply to trusts or equitable estates. For this reason, a particular tenant cannot divest or discontinue the remainders; nor does the rule respecting the abeyance of the freehold apply in reason, nor is it applicable in practice, to the determination of the particular estate before the remainder can vest, and, therefore, the remainder, if good in its creation, may take effect, without regard to any accident which may happen to the particular estate.

Limitations of future use open a wide field for distinctions. The general proposition applicable to them is, that they are to operate either as springing or shifting uses, or as remainders.

When they are to operate as remainders, they are subject to the rules which concern remainders; and therefore the remainder, if contingent, may be destroyed, in the same

manner as it might have been destroyed if it had been introduced into a conveyance operating by the rules of the common law.

It is also a rule, that no limitation shall operate by way of shifting or springing use, or executory devise, if consistently with the intention of the parties it may operate as a remainder, either vested or contingent.

It follows, that no limitation in a deed, or even in a will, will be referred to the learning of shifting, or springing uses, or to the learning of executory devises, if it can, by any reasonable construction of the deed or will, take effect as a remainder.

A few instances will exemplify the distinctions.

1st. A limitation by will, or a limitation of use to *A* for his life, and from and after the death of *A* and *B* to *C* in fee; or to a person unborn; or to a person not ascertained, will give to *A* a vested estate for life, with a contingent remainder, expectant on that estate, to *C*, or other donee of the remainder. But when a gift by will, or limitation of use, is made to *A*. *for years*, and after the determination of that term, then to another person on a contingency; or to a person not in existence; or to a person not ascertained: or when a devise is made to *A* for her life, and from and after the death of *A*, and one day, or one year, then to another person, whether ascertained or not ascertained, or whether in existence or not

in existence ; in all these instances the limitation over cannot be good, consistently with the law respecting remainders.

For want of a prior estate of freehold for its support, the gift is capable of validity only by calling in the aid of the law, concerning executory devises, or springing or future uses.

So if a gift be made by will, or limitation of use, to *A*, *in fee*, and upon some event it is directed that the estate of *A* shall cease, and the land shall remain to *B* in fee, or to *B* for life, with limitations over ; resort must be had to the learning of executory devises or shifting uses ; because these limitations over, after a fee, or in derogation, abridgment, or destruction of a prior estate, are repugnant to the rules of the common law.

These and the like distinctions are relevant to all other interests arising out of wills or limitations of uses, in which, either under the learning of powers, or conditional limitations, one estate is to take effect in derogation, or in abridgment, or in exclusion of another estate : but to guard against inconvenience, the law has prescribed, by the rules against perpetuities, the limits within which these gifts by executory devise, shifting or springing use may have effect : and, with the exception of limitations which are to defeat estates tail, and which, by another rule of law applicable to estates tail, may be barred by a recovery suffered by the tenant in tail, no limitation by way of shifting, or springing use,

or executory devise, will be good, unless it be so limited, that it must vest or fail of effect, within the period of a life, or lives in being, and twenty-one years beyond the death of the surviving life, and the period of gestation : and two periods of gestation are allowed, one for the commencement of the period, and the other for the determination thereof, as in the instance of a gift to a child, with which *A* is ensient, in fee ; and in case he shall depart this life under the age of twenty-one years, then to his first son in fee ; and in case such first son should die under the age of twenty-one years, then over.

The doctrine of executory devises, and shifting and springing uses, is bottomed partly on the learning of limitations, and partly on the learning of conditions ; and the limitations themselves are distinguished by the appropriate terms *conditional limitations*.

The rules of law respecting conditions, will be found under the division which treats on that subject ; as it is of the first importance to distinguish accurately between rules which govern the limitations of estate by conveyances operating under the rules of the common law ; and limitations of use in conveyances to uses, or by bargain and sale, and covenant to stand seised.

A general outline of these rules is given in vol. 2, Of the Practice of Conveyancing, p. 194 ; and though it would be convenient, it is not deemed justifiable, to introduce them in this place.

*Of the Declaration of Trust.*

TRUSTS are of several descriptions :

1st, Those which limit estates in a special manner, as to *A* for life, remainder to his first and other sons in tail, or the like.

The observations on uses are applicable to trusts of this description; except that contingent remainders of a trust cannot fail of effect by the determination of the particular estate, or any alienation by the owner thereof. Nor is the doctrine of the common law, which imposes the necessity of a prior particular estate, in any manner, or in any instance, applicable.

2dly, Trusts by way of power; as upon trust for such persons, &c. as *A* shall appoint, and these trusts fall under the same consideration as powers.

3dly, Trusts which direct a settlement, &c. a sale, &c. an exchange, &c. the payment of debts generally, the payment of scheduled debts; the payment of portions, of money to be raised by way of mortgage for particular purposes; varying the mode of trust with all the various exigencies of families or individuals.

Trusts of this description should be abstracted as far as they are material to the title.

Two objects are to be particularly regarded; viz.

To show so much of the trust, as will satisfy the purchaser that the act which was directed to be done, has been duly performed, or has failed

of effect, as far as it is material to the title ; and if it be incumbent on the purchaser to see that the money arising under the trusts has been duly applied, then the trusts which direct the application should be stated.

In abstracting the trusts there should be shown the act to be done, as to sell, &c. the exchange, &c. by whom it is to be done ; the time, if any time be pointed out, at or before which the trust is or is not to be performed ; under what circumstances, when any circumstances are imposed as material ; with whose consent, or at whose request, if any such consent or request be made requisite ; the mode by which any act is to be done, if any mode be pointed out, as by deed, &c. by auction, &c. ; the manner in which any act is to be done, as by deed, will, &c. if any mode be prescribed ; the person in whose favor the act is to be done ; as in favor of any particular person, or a class or description of persons ; and when the nature of the trust requires it, the purchaser should see that all these requisites have been observed, and the documents which prove the observance of these requisites should be abstracted.

But in most trust deeds prepared with skill, there are contained provisions, that the receipts of the trustees should be sufficient discharges ; and that the purchasers should not be bound to see to the application of their money : and in some cases the purchaser is exonerated from inquiring whether such sale or mortgage be

necessary for the purposes of the trust; or whether any notice required by the terms of the trust has been given.

In abstracting deeds containing this or the like provision, when the provision has been acted upon by payment of the money pursuant to this provision, then there is not any occasion to state the trust directing the application of the money.

But if no such provision be contained in the deed or will; or if the parties are dealt with on the foundation of their ownership and beneficial interests, independently of this provision; then the trusts which direct the application of the money should be stated, and care should be taken to see that the money has been duly applied according to the trusts.

This observation is equally applicable to all transactions which have taken place within a reasonable period, say thirty or forty years.

Trusts are either *executed* or *executory*.

Trusts executed are equitable estates fully and finally limited by the parties. Trusts executory are trusts which require a settlement to be made for expressing the use or trust in formal and definite terms.

All trusts are, in some degree, executory; but they are not executory in this sense. See *Essay on the Quantity of Estates, introductory chapter*, and *Succinct View of the Rule in Shelley's Case*.

In regard to trusts, it is therefore necessary to consider whether they are executed or executory; for the trusts fully declared, and giving



equitable interests, are construed by courts of equity in the same manner as the like limitations of the legal ownership would be construed.

Yet courts of equity adopt a different rule for the construction of *executory trusts*. These courts look to the object of the instrument, and the intention of the parties, and treat the language of the trusts as short heads of an agreement, to be carried into effect by a more formal settlement, and thus amplify the expressions, and control any legal construction, which does not quadrate with the intention.

The following note, by Mr. Watkins, will afford ample and very useful information on this head :

“ As in marriage articles, a provision for the issue appears to have been the chief end in view, a court of equity will often consider them as purchasers (1 P. Wms. 145, Bale and Colman, ib. 291, Seale and Seale), and decree a strict settlement on the children, in order to prevent one of the parents only from frustrating that intent, by destroying the entail which might otherwise have taken place in the parent according to its legal construction.

“ And therefore, where there is no danger of such end being so defeated, a court of equity will not interfere, but suffer the words to have their legal operation, and the entail to remain in the parent, as where the wife is made tenant in tail of lands moving from the husband, 2 Ves. 358, *Howell v. Howell*, 2 Atk. 477, in the case of *Green v. Ekins*, and 1 Fearn 131, 162, 2 P. Wms. 356, note. But it seems

that this rule will not hold as to copyholds, the statute 11 Hen. VII. c. 20, not extending to them, see 2 Cruise 158; 2 Ves. 358, note. For where the power of altering such trusts has been vested in both parents, the court has refused to interfere, 2 Ves. 358, *Whately v. Kemp*, cited 1 Fearn 132, &c.

“ So where a strict settlement appeared to have been manifestly contrary to the intent of the parties, 2 Ves. 358, 9, 1 Fearn 135.

“ Nor will the court interfere where a settlement has been made by the parties subsequently to the articles, but before marriage; for the settlement will in such case be considered as a new agreement, and to control them, Cas. Temp. Talb. 20, *Legg v. Goldwire*, 1 Fearn 154, 2 P. Williams 356, note.

“ Unless such settlement be expressly alleged to have been made in pursuance or performance of the articles, so that the presumption of a new agreement be done away, 1 P. Williams 123, *Honor v. Honor*, 2 ibid. 349, *West v. Erissey* 356, note, Cas. Temp. Talb. 20, *Legg v. Goldwire*, 1 Fearn 138, &c.

“ But where the settlement is made after marriage, the court will set up the articles against the settlement, 3 Atk. 371, *Hart v. Middlehurst*, Cas. Temp. Talb. 20, *Legg v. Goldwire*, ibid. 176, *Streatfield v. Streatfield*, 2 Atk. 39, *Glanville v. Payne*.

“ Yet where other property of a parent is limited to any of the issue, and the issue so provided for, bring a bill for carrying the articles

into strict settlement, the person so bringing the bill, shall in many cases be put to election before the court will decree the execution of them, Cas. Temp. Talb. 176; *Streatfield v. Streatfield*, see 2 Atk. 39, *Glanville v. Payne*.

“ But if there were no articles entered into previously to marriage, there can of necessity be none to control a settlement made afterwards, and where there are not articles as well as a settlement, the court will not construe words which make a legal estate tail in the parent to [provide for] the first and other sons, &c. 3 Atk. 294, *Warwick v. Warwick*, 2 Atk. 39, *Glanville v. Payne*.

“ Unless indeed there is a direct declaration in the recital of the settlement, that it was the intention of the parties to make a provision for the issue by securing the premises settled for their benefit, in which case the court will effectuate such intention by decreeing a strict settlement, if the words of the deed would otherwise give an estate tail to the parent; enabling such parent at law to defeat the provision for the issue, contrary to the recited intention. But where the recital is to assure the lands in general terms, or expressly to settle them “ to the uses thereafter mentioned,” a court of equity will not interfere, but suffer the words to have their legal effect, see 3 Br. Cha. Cases 27, *Doran v. Ross*, 1 Ves. jun. 57, S. C. and 170, 1; and see 2 Ves. 358, *Howell v. Howell*, and *Antea and Cowp. 12 Moore v. Magrath*.

“ And note, that in case of articles, it is not enough that they be recited, they must also be produced, *Ambler* 515, *Cardwell v. Makeril*, and 1 *Fearne* 159.

“ Nor will a strict settlement be decreed in favour of collaterals, unless it should be apparent from the circumstances of the case, that they were included in the considerations; for the intention of such articles seems, *prima facie*, only to provide for the issue of the marriage; or unless the articles be decreed as to the persons first claiming, in which case the court will decree in their favour, as it always executes articles *in toto*, or not at all, see 10 *Mod.* 533, *Osgoode v. Strood*, 2 *P. Wms.* 245, *S. C.* 2 *ib.* 594, *Vernon v. Vernon*, 1 *Ves.* 73, *Stephens v. Truman*, 3 *Atk.* 186, *Goring v. Nash*.

“ But as the chief view of the court is to secure a provision for the issue, independently of the parent, it will decree an execution in favour of the children of the party covenanting to convey, and for whom that parent was morally obligated to provide, although such children be not the issue of the very marriage in consideration of which the articles were entered into, as those of a former or of a future marriage; or where a father covenants to settle lands on the marriage of his son, with remainders over to a daughter, and the heirs of her body, it will carry the articles into execution in favour of the issue of the daughter, since the father was morally obliged to provide for her also. See the cases last cited, and particularly *Goring v. Nash*,

1 Ves. 216, and 1 Atk. 265, *Newstead* and others against *Searles et al.* Cowp. 710, *Doe ex dem. Watson v. Routledge*.

“In cases of wills,\* where the claimants are merely volunteers, the court will not aid. See 1 Fearne 163. See also 2 P. Wms. 684, n. 1 *Barnwell v. Large* (cited)

“Nor will equity decree a strict settlement even in the case of articles against purchasers for a valuable consideration, and without notice, 3 Atk. 291, *Warwick v. Warwick*, 1 Fearne 156.

“But a settlement, though made after marriage by a person not indebted at the time, will be good against subsequent creditors, 1 Atk. 15, *Russell et al. v. Hammond et al.* ib. 265, *Newstead v. Searles*, 2 Ves. 11, Lord *Townshend v. Windham*, 2 Bro. Cha. Cases 90, *Stephens v. Olave*, Cowp. 705, *Doe de Watson v. Routledge*.”

Again, those trusts which are not executed by the statute are to be carefully distinguished from uses which are executed by the statute.

1st. They are of *chattel interests*, for no use can arise under the statute, unless there be a *seisin* to serve and supply the use. But a term of years in a limitation of uses of the fee, or of an estate of freehold; or a term of years bargained and sold by a person who has a fee, or an estate of freehold, may be executed into estate by the statute.

But an assignment of a term, or other chattel

\* Except when there are trusts to be executed by a settlement.

interest to *A*, in trust for *B*, will leave the legal estate in *A*. The trust will not be executed by the statute of uses; on the contrary, it will remain an equitable interest.

So a demise by a termor, by words of bargain and sale to *B*, will not operate as a bargain and sale by force of the statute of uses, but merely as a demise at the common law, and be a mere *interesse termini* till entry.

2. So there cannot be any use to be executed of copyhold lands, on a surrender of them by the copyholder; he has no seisin. The uses declared in customary surrenders, confer a legal estate by the rules of the common law. Any uses declared of the estate of the person admitted as copyhold tenant, will be trusts subject to the jurisdiction of a court of equity.

3. An use on an use will be a mere equitable interest. The first use only, and not the second use, will be executed by the statute. Therefore, on a common law grant from *A* to *B*, in fee, to the use of *B* in fee, in trust for *D* in fee; or by *A* to *B* in fee, to the use of *C* in fee, in trust for *D* in fee; or a bargain and sale, under the statute of uses, to *A* in fee, to the use of *D* in fee; or an appointment made under a power in a conveyance to uses, to *A* in fee, to the use of or in trust for *D* in fee, will give *D* an equitable interest only, and not a legal estate.

In the first case, the use declared in favour of *B* is void as an use, and though *B* will be seised

by the rules of the common law, that use will in point of legal effect, though not in equity, exclude the use declared in favour of *D*. The judges presiding in courts of law treat the use declared in favour of *D* as repugnant to the use declared in favour of *B*; but equity treats *B* as a trustee for *D*; that *B* may not retain the beneficial ownership contrary to the declared intention of the parties.

In the second instance, *C*; in the third instance, *A*, the bargainee; and in the fourth instance, *A*, the appointee, is the *cestui que* use; and the use or trust in favour of *D* is an *use on an use*, or an use in the second degree; and the first use only is regarded by courts of law, while the courts of equity will maintain the second use as a trust. Thus the first use only will be operated on by the statute of uses.

Distinctions however exist which must be carefully regarded.

1. A conveyance to *A* in fee, to the use of *A* in fee, with a shifting use on some event, to *D* in fee, will enable the statute to operate on the use to *A*; so that he will be seised by force of the statute, and not by the rules of the common law.

So in this instance, or in any other example of an use, with a like shifting use in favour of *D*; the use to *D* may be executed by the statute, because the use to *D* is not an use on an use, or an use in the second degree. It is one use substituted for another use; and exempt

from the objection which, in other cases, renders the interest of *D* merely equitable.

Again, although a bargain and sale of an use to *A* in fee, will not admit of a declaration of use on the seisin of *A*, so that the second use may be executed by the statute; the same reasoning does not apply to a bargain and sale, operating by the rules of the common law; as in the instance of a bargain and sale by executors having an authority to sell, or a bargain and sale under the land tax and other like acts. In cases of this sort, a common law seisin will pass to the bargainee, and uses, capable of execution under the statute, may be declared of this seisin.

Again, though no use, to be executed by the statute can be declared of the estate of an appointee of an use, because he himself is merely a *cestui que use*; yet an appointee, under a common law authority to sell, would obtain a common law seisin; and uses to be executed by the statute, may be declared of that seisin.

Lastly, trusts, which are not uses, as trusts to sell, to raise portions and the like; and also, trusts which, though they in effect give the use, yet require that the legal estate should remain in the trustees, as trusts for the separate use of a married woman; trusts to receive and pay, or apply the rents as distinguished from an use; or trusts to permit another person to receive the rents. *Burchett v. Durdant*, 2 Ventr. 312, *Broughton v. Langley*, 2 Lord Raym. 873,



Horton *v.* Horton, 7 T. Rep. 652, Shapland *v.* Smith, 1 Bro. C. C. 75, Silvester *v.* Wilson, Williams' note to 2 Saunders, p. 11, and as distinguished from trusts in the alternative, *to pay* to *A B*, or *to permit* him to receive and take the rents, &c. Doe *v.* Biggs, 2 Taunton 109, are trusts which remain subject to the jurisdiction of courts of equity, and are not transferred into estate by force of the statute of uses.

Some of these trusts give mere chattel interests, in the nature of personal estate; others give freehold interests, and even interests of inheritance in equity. Thus there may be equitable *estates* for years, for life, in tail, and in fee.

The general rules concerning trusts, or equitable estates, are,

1. The *cestui que* trust is the beneficial owner in equity, and has an equitable estate.

2. This estate gives the *like power* of alienation in equity, as may be *rightfully* exercised at law, by the owner of a like legal estate.

3. The like limitations may be made of the equitable, as may be made of the legal, ownership.

4. The limitations of trust, or equitable estates, receive the like construction, as if they were limitations of the legal estate.

5. Whenever a limitation of an use would be good by the rules of law, a like limitation of the trust or equitable ownership will be valid in equity.

6. Any limitation which, as tending to a

perpetuity, would be void if it were of an use, will be void if it be of the trust or equitable ownership.

7. Of equitable estates, there cannot, in a technical sense, be any disseisin; and therefore, notwithstanding adverse possession, there may be transfers or dispositions by the equitable owner, either by deed or will.

In *Philips v. Brydgès*, 3 Ves. 127, Lord Alvanley stated the rules of equity applicable to trust estates to be, that such equitable estates are to be held perfectly distinct and separate from the legal estate. They are to be enjoyed in the same condition; entitled to all the same benefits of ownership; disposable, devisable, and barable, exactly as if they were estates executed in the party; and the persons having them, may without the intervention of the trustees, or the possibility of their preventing them from exercising their ownership, act as if no trustees existed; and this court will give validity to their acts.

There are some qualities of legal estates, which are not common to the corresponding interests of the equitable ownership.

1. A particular tenant of the legal estate, either for life or for years, may forfeit his estate by levying a fine, and other like acts. But no act done by a tenant of a like equitable estate will be a forfeiture of his estate.

2. A tenant for life of a legal estate may, by feoffment or fine, divest the remainder or

reversion, and turn such reversion or remainder into a right of entry, and acquire a wrongful fee. *Goodright v. Forrester*, 1 Taunton, 578. No such effect will be produced by any alienation of the equitable owner of a like estate, since there cannot be any disseisin of an equitable estate.

3. A tenant in tail in possession of the legal estate may discontinue the estate tail, and the reversion and remainder, and turn them into a right of action without barring them. But no alienation by a tenant in tail of an equitable estate tail will operate as a discontinuance.

4. Contingent remainders of the legal estate may be destroyed by the determination, the tortious alienation, surrender, or merger of the prior particular estate, by which the remainder is supported ; while no such consequence will be induced, as to a contingent remainder of the equitable ownership, by any act proceeding from the tenant of a prior particular estate of the same ownership.

5. Owners of legal estates cannot convey without certain ceremonies, as livery of seisin ; a lease, or bargain and sale, as a foundation for a release ; enrolment of a bargain and sale, &c. &c. But an equitable owner may convey by any deed which contains evidence of an intention to grant his estate. Such equitable grant must, however, have formal words of limitation.

6. Though it be a rule of law applicable to legal estates, that "*quod meum est, sine facto meo*

(alienation,) *sive defectu meo*, (forfeiture, &c,) *amitti, vel in alium transferri non potest;*" yet an equitable estate may be lost by the alienation of the trustee to a purchaser, for a valuable consideration, and without notice; and it may be lost by escheat from the trustee, as a consequence of his attainder, either for treason or felony.

Some of the consequences attaching on equitable estates are,

1. On the failure of heirs of the equitable owner of the fee, there will not be any escheat to the lord. The trustee will have the benefit of the estate.

2. On the escheat of the legal estate, the lord will hold discharged of the equitable estate.

3. Equitable estates are subject to curtesy, but they are not subject to dower or freebench.

4. These estates are, *by statute law*, subject to executions, for the debts of the *cestui que* trust; only, however, while the trustee continues seised for the benefit of the debtor.

5. Equitable estates are descendible in like manner as legal estates; and there may be a *possessio fratris* of an equitable seisin.

*Of Conditions; conditional Limitations; Clauses for Redemption; and other special Agreements.*

CONDITIONS may defeat the estate; and if they exist, they should be stated fully; that it

may appear in what degree, and to what extent, they may operate, and upon what terms, and by what mode, they may be discharged or avoided ; and if they have been performed, the material circumstances should also be stated, that an opinion may be formed, whether the condition has been discharged.

This caution is equally necessary in application to conditional limitations, by way of shifting use.

Of the nature of conditions also are provisions introduced into conveyances to uses, and annexed to terms for years, for the purpose of defeating the same.

In general abstracts are too concise in giving this proviso, in those instances, in which the proviso is relied on as having caused the cesser of the estate.

The proviso ought to be fully stated, that it may appear, whether the circumstances which have taken place, are such as fall within the scope of the terms of the proviso, so as to be a performance of the condition.

It is not sufficient, that the portions have been paid or satisfied to bring the proviso into operation. They must have been paid or satisfied in the mode, and by the person, and within the time prescribed by the proviso, unless the proviso has words for the cesser of the term, when the trusts thereof have been performed or satisfied, discharged, or become unnecessary, or some such like words.

Provisoes for redemption are to be stated shortly or fully, according to circumstances.

When they contain any special provision, as a settlement of the equity of redemption, such special circumstances should be fully disclosed. With this exception, there is not any necessity for detailing more of this proviso than will show by whom the money is to be paid, the sum to be paid, the time of payment, and the rate of interest reserved.

However, if the mortgage be existing, or if the deed which contains the mortgage be, from the circumstances of the case, such as would be necessary to be recited in the deeds to be prepared from the abstract, then the proviso should be stated as fully as it ought to be introduced into a correct recital of any one of the deeds to be so prepared.

Other special agreements should be abstracted under the like regulations; and so much of the clause as can materially affect the title should appear on the abstract.

In detailing the duty of the conveyancer, the general rules of law applicable to these points will be considered.

### *Of Powers.*

IN regard to powers, the course to be observed must be dictated by circumstances.

Powers which have been exercised, or which are to be exercised, with a view to complete

the title, should be given almost *verbatim* from the deeds, will, &c. as far as the powers are material to the title.

They should show at least the following circumstances, as far as such circumstances exist, and are expressed in the power ;

1st, The person or persons by whom the power is to be exercised.

2dly, The mode of exercising the power, as by deed, will, &c. and the circumstances which are to attend such execution, as the attestation, &c.

3dly, The time at which the power is to be exercised, if any time be prescribed.

4thly, The consent or request, &c. which are essential to a valid execution of the power ; and the mode in which such consent, request, &c. are to be expressed ; as by deed, &c. to be attested by two witnesses, &c.

5thly, The act authorized by the power, as to sell, exchange, &c. together with the circumstances connected with the mode of executing the power, as to exchange for lands of equal or greater value, or for lands in a given county, or for lands of a given tenure, as freehold, copyhold, leasehold, or the like.

6thly, The person or persons in whose favour the power is to be exercised, as children, or a particular child ; or objects of a given description, as children living at the death, &c. ; and the estate which may be appointed to them, if any particular estate is mentioned in the power

also whether the power is to be executed revocably or irrevocably, or the like.

And if any particular application of the money be directed, and there is not any provision for indemnifying a purchaser or mortgagee from seeing to the application of his money, the clause which directs the application should be stated fully : that it may appear that the money has been duly applied in the manner in which the same was applicable.

Such powers as are barred, or released, or extinguished, or become incapable of taking effect; or if they are in their nature immaterial to the title; as powers of leasing, &c. need not to be stated at large.

It is sufficient that there be a notice that such a power was contained in the settlement, in these or the like terms, *with power to A B to jointure on a second wife*; or, *with the usual power to sell and exchange and make partition*; or, *with a power to raise portions for younger children of a second marriage*, or the like.

When to a power there is annexed an indemnity to purchasers paying the money, and the power has been exercised, the clause which enables the trustees to give receipts for the purchase money should be added, and, as a general rule, the clauses which contain the direction for the application of the money should be omitted.

It frequently happens, that a settlement, or other deed of trust, contains a power to change



## ON TITLES:

trustees, or to add new trustees. When this power has been acted on, and the title is, or is to be, derived through or under the new trustees, and acts done by these trustees, the material parts of the power should be disclosed by the abstract. In other cases it is sufficient that there should be a short reference to powers of this nature.

### *Of Covenants.*

IN abstracts of title to leases, all burthen-some covenants which may affect the purchaser at law or in equity, should be stated in the abstract.

But in abstracts of deeds concerning the inheritance, there should be a general reference to the covenants in this form, "*With the usual covenants for title;*" or with usual covenants for seisin in fee; good right to convey; peaceable enjoyment; free from encumbrances; and further assurance.

Sometimes the covenants are expressed still more fully, by showing the extent of the covenant, and consequently introducing the clause 'notwithstanding,' &c.

That part of the covenant which deserves most attention is, the *exception*, if any, *against encumbrances*; such exceptions, as often as there are any, and the encumbrances there noticed, as far as they are material to the title, should be stated in the words of the covenant; or at least

so fully as to show the nature and extent of these encumbrances.

Outstanding terms also, noticed in the exception, should be expressed in this part of the abstract; but briefly or fully, according to the circumstances of the case.

If there be not any other information concerning a term, the abstract should adopt the words of exception. But if the term, and all circumstances belonging to it, have been previously noticed, then the reference to it may be short; except in those cases in which the evidence of the title to the term appears different in the exception from the state of the evidence in the former part of the abstract; for instance, if by the former deeds it appears that the term was vested in *A*, but by the exception it appears to be vested in *B*; this circumstance, together with the mode, (if it appear,) by which the title has been thus varied, should be particularly expressed in this clause of the abstract.

Also, as often as a *covenant for the production of title deeds* discloses any evidence of the title not contained in a former part of the abstract, it becomes material, and should be noticed.

The mischief and inconvenience arising from such covenants, and the disclosure they afford, and the notice they give of dormant encumbrances, afford abundant reason for the modern practice of taking such covenant in one or more separate deeds.

*Of the Execution, &c.*

AT the foot of the abstract of every deed, it should be noticed by whom the deed has been executed, or that it has been executed by all the parties, or by all of them excepting certain persons, naming them.

And if the deed was executed, in exercise of any power which required a particular mode of execution, it should appear from this part of the abstract that this mode of execution was observed ; for example, if the deed be required to be signed, sealed, and delivered, it should appear to be signed, sealed, and delivered ; and if any given number of witnesses were required to attest the execution, it should be noticed that the deed is attested by this number of witnesses, as far at least as respects the persons as to whom such attestation was rendered necessary.

And if there be a defect in the mode of execution or attestation, sufficient should be stated to raise the question on this defect, that it may be considered whether the want of the prescribed mode of execution or attestation affects the validity of the title at law or in equity.

Of course the memorandum which refers to the execution and attestation should be more or less particular and circumstantial, as the nature of the case may dictate.

Except in particular cases no more is requisite than a clause to this effect : '*executed by*

*A B. and C D*, and duly attested ;' or, '*executed by all parties, and duly attested.*' And if circumstances should require, as they frequently do, that the execution, at a time different from the date, should be shown, then the time of execution should be stated ; more especially if the attestation contain, as it ought to do, a specification of the time of execution. For instance, a lease under a power may be good, as a lease in possession, if it be executed after the date ; while it would be void if executed on the day of the date.

So a will may be operative on the legal estate, because the will was published after the execution of the conveyance ; although the publication took place after the day on which the deed is dated.

Also, at the foot of the abstract of deeds, in which the purchase money is paid under a special power or direction ; and even at the foot of the abstracts of deeds, (especially those of a modern date,) from a seller to a purchaser, it should appear that a *receipt* has been given by the person to whom the money is expressed to have been paid, and signed by the persons by whom the same ought to have been signed. Since, in the contemplation of a court of equity, the receipt is the material discharge for the purchase money ; and, except in the instances already noticed, the want of a receipt is implied notice that the purchase money remains unpaid ; and that there is, till the contrary be

shown, a subsisting lien in the vendor for the purchase money.

Also, when part of the money secured by a mortgage appears, by a receipt indorsed on the mortgage, to have been paid off, this fact should be noticed in this part of the abstract.

Also, when a deed requires *enrolment*, livery of *seisin*, a memorial, as in case of grants of annuities for a life or lives, or for years determinable on a life or lives, or other external act to give it validity, the fact of enrolment, livery of seisin, memorial, &c., and the time when it took place, should be stated.

Sometimes a feoffment, or a lease for a life or lives, requiring livery of seisin, may be good, because livery was made after the time limited for the commencement of the grant ; while the instrument would be void, as limiting an estate of freehold *in futuro*, in case livery had been made at the period of the date of the deed of feoffment, or of lease.

In cases of this sort the evidence of the time of livery, &c. should be added.

Also, if a deed has been cancelled, the fact should be noticed ; and yet the law is now settled to be, that neither an actual or a voluntary cancellation of a deed will restore the estate to the former proprietor. There must be an assignment or surrender of the term, if a term passed ; or a reconveyance of the estate of freehold in case an estate of freehold was conveyed.

So if a deed has, since its execution, been altered by erasure or interlineation, that circumstance should be noticed. Fraudulent alteration by the grantee would vitiate the deed. It was formerly ruled, that an alteration by a stranger, in a *material* part, would also vitiate the deed. It is now agreed, that no alteration by a stranger will avoid the deed; but it may be given in evidence, as far as its contents appear; and extraneous evidence will be admitted, to show the language in those parts which were altered. The old rule is applicable only when, from the want of evidence, or the uncertainty arising out of the evidence, the contents of the deed, as they stood before alteration, cannot be ascertained.

Also, if there be any explanatory agreement in a memorandum, made on the deed before the execution, such agreement should be added to, and form part of, the abstract, and inserted prior to the notice of the execution.

And, as to lands in register counties, viz. Middlesex, and *East, West and North* Ridings of York, it should be shown that the deed has been registered, and in what book and page the registry is to be found.

As a point of curiosity, rather than utility, it may be noticed, that if an illiterate man, a man who cannot read, require, at the time of his execution of the deed, that the deed should be read to him; and the deed is read fraudulently,

as having other contents than it really has, the deed may be avoided by a plea of that fact.

*Of Fines, Recoveries, &c.*

IN abstracting a fine there should be stated the term of which it is levied, the names of the conusors, the names of the conusees, the parcels, as far as they are material, and the names of the townships and parishes, as far as they are applicable to the lands in question.

And when a fine is levied to bar an entail, or to strengthen a title by nonclaim, it should be stated that the fine was with proclamations; and, in strict propriety, it should be shown in what terms, and on what days, the proclamations were made, that an opinion may be formed whether the proclamations were duly made.

And in abstracting common recoveries there should be shown the term in which the recovery was suffered, the names of the demandant, the tenant, the vouchees, including the common vouchee, and the order of voucher, namely, that the first vouchee vouched the common vouchee, or any other mode of voucher; the parcels which are comprised in the recovery, and the names of the townships and parishes, as far as they are material to the lands in question; and the time at which the writ of seisin was returnable, and seisin delivered.

The observation recommending an *alpha-*

*betical* arrangement of the names of townships, parishes, &c. applies, with great propriety, to fines and recoveries.

The general object of fines and recoveries, it should be remembered, is,

1st, To convey the estates of freehold or inheritance of married women.

2dly, With proclamations to operate by estoppel.

The peculiar operation of a fine is to gain a title by nonclaim, or to bar heirs in tail.

The peculiar operation of a common recovery is to bar reversions, and remainders expectant on an estate tail, and conditions and collateral limitations annexed to that estate.

And as a fine cannot bar by nonclaim, nor can bar heirs in tail, unless the fine be with proclamations, there is a manifest propriety in showing that the fine was with proclamations, when the fine could not have accomplished its object, unless it had been proclaimed.

Also, as a common recovery will not bar either the estate tail, or ulterior or collateral interests, unless there be a voucher over by the owner under the entail, it is proper to state that there was a voucher of the common vouchee.

The practice, if it does not promote any other advantage, preserves a remembrance of principle, and this alone is an object.

Besides, it is too much to rely on the apology generally made, for the omission; to state that a fine was with proclamations, or that there was



in recovery a voucher of the common vouchee, namely, that all fines are proclaimed, and that in all recoveries there is a voucher of the common vouchee. It is generally, only, and not universally, true, that fines are proclaimed, and that there is in recoveries a voucher of the common vouchee.

Let it be observed also, that a fine to bar by nonclaim must be levied *by* or *to* a person who has an estate of freehold either in possession, reversion, or remainder, under a title adverse to the rightful owner; and that a common recovery, suffered to bar an entail, must be suffered by or against a tenant who has the immediate freehold; and that a common recovery will not bind the entail, or the remainders over, &c., unless it be suffered by the owner of the entail as vouchee; except in the single instance of his being the tenant of the estate tail in possession intended to be barred, and his being in that case named as tenant to the writ of entry, and vouching as such tenant.

#### *Of Acts of Parliament.*

ACTS of parliament are to be considered as private conveyances. They differ however from private conveyances in the circumstance, that the title does not altogether and always depend on the *ownership of the parties*, and the nature and extent of their interest. Frequently it depends on the extent and operation of the words of the act, qualified or restrained, as they

may be, and generally are, by provisoes and exceptions, introduced into the act.

Few titles are more perplexed than those which depend on allotments under inclosure acts, and an observation to that effect has already been made. The leading feature of inclosure bills, acts for partition, exchange, &c. must be understood to be, to make the lands which are received upon allotment, exchange, partition, &c. subject to the same estates and uses as the lands, &c. in respect of which the allotment, exchange, &c. were made.

In general, by force of a provision in inclosure acts, the allotted and exchanged lands pass by a will made prior to allotment, as a substitution for, or in addition to, the lands given by the will; but no provision for that purpose is contained in the general inclosure act.

The local act therefore must be inspected, to see that it contains such provision.

The difference also between exchanges under inclosure acts, and exchanges under acts for that special purpose, are to be noticed.

Under inclosure acts the exchange will be absolute; communicating positively to the lands received in exchange, the title which governed the lands given in exchange; while in exchanges under acts for that special purpose, the eviction clause is generally framed in the same manner as if the exchange were made by mutual grants between the parties; or would have been implied by law on a formal exchange.

The singularity attending the construction of acts of inclosure, and of exchanges of land for land, &c. or common rights for land, under these inclosure acts, may be thus stated.

There is a *change of land*, &c. but *not a change of title*.

The title which *A* has to his lands, or common rights, at the time of allotment or exchange, is communicated to the land he receives under the allotments or exchanges; while, under a mere private act of exchange between individuals, each holds the lands under the title which attached to these lands prior to the exchange. He may therefore be evicted, though the title to the lands he gave in exchange may be perfectly good.

His remedy on eviction is, in this case, to resort to the lands he gave in exchange. But then, as under a common law exchange, the whole exchange, and not a rateable part, must be defeated. And for a long time, say sixty years, after the exchange, he must, for the satisfaction of a purchaser, make out the evidence of title, as well to the lands given in exchange, as to those he holds under the exchange.

Each of these considerations is one of considerable difficulty, and frequently of great anxiety and expense.

In abstracting acts of parliament the clauses to be principally regarded, are,

1st. *The date*, or rather time of passing the

act, viz. in old acts of parliament the year of the reign in which the act was passed, and in modern acts, which have that fact, the day on which the act received the royal assent. This date is now added to the title; under the provisions of an act of parliament passed for the purpose in the present reign.

2dly. *The title of the act.*

3dly. The recitals of the act, as far as they can throw any light on the state of the title, or lead to the construction of the enacting clauses.

4thly. The enacting clauses ; and if the act be by way of power, it should show all the circumstances of the power, in like manner as is recommended under the head "powers;" and when it vests the estate, discharged of uses, &c. the clause should be abstracted, so as to show the lands which are the subject of the act, as far as it is material to the title in question ; the persons in whom the legal estate is vested ; the duration of the estate limited to them ; the time from which the estate is to be vested ; the uses, &c. from which the lands are discharged ; the trusts which are to be performed, as to sell and exchange, &c. ; the provision, if any, to indemnify the purchasers from seeing to the application of their money ; and when there is not any such provision, or the title depends on the ulterior trusts, then the ulterior trusts, and the mode in which the money is to be applied.

To these particulars should be added the

*exception*, or *saving clause*, so as to show whose rights are preserved, and consequently as against whom parliament has left the rights open.

In general, indeed almost universally, the sole object of an estate bill is to leave the title exactly as it stood under the ownership of the testator or settler, so only as to liberate it from certain uses which he has declared, and to pave the way for a new or more convenient settlement, by selling part of the lands to exonerate others, or by selling certain parts of the lands with a view to the purchase of others more convenient, or to authorize partitions, exchanges, and the like.

Inclosure acts are seldom abstracted. The person who prepares the abstract contents himself with stating, that in pursuance of an act passed, &c., intituled, &c., *A B* and *C D*, two of the commissioners appointed by the said act, allotted to *E F* all, &c. in lieu of, &c., here stating the lands in lieu of which the allotments were made.

This practice has arisen from the circumstance, that all inclosure bills are, in their provisions, nearly the same.

And now the statute of 41 Geo. 3, cap. 109, has, in effect, incorporated into every inclosure bill, various provisions; being the ordinary regulations which were usually introduced into old inclosure acts.

On the one hand, not to delay the reader, and on the other hand, to afford him a ready

access to the provisions of this act, an abstract of the act will be added in the *Appendix*.

Of course, when these provisions are varied by the local or particular act, the variations should be shown ; and if that act contained any special matter which can affect the title, these special provisions should be stated ; and the person by whom the abstract is examined, on behalf of the purchaser, should take especial care to see that the award is warranted by the provisions of the act ; that it is duly made and enrolled, &c. as the act requires ; and in particular, within the time, if any, limited by the act.

It should seem that the enrolment must be on parchment, 1 Inst. 35 b, 36 a, 2 Inst. 673.

In those parts of the abstract which are subsequent to the inclosure acts, the parcels must be abstracted in such terms as will show that the lands received in allotment are comprehended in the conveyances, assignments of attendant terms, and other instruments.

In inclosure acts, it is a common provision to enable tenants for lives, husbands seised in right of their wives, and other persons having partial interests, to make mortgages by demise, with the consent of the commissioners, for defraying the expenses of the inclosure ; and it will appear in the appendix that the general act has a similar provision. The effect of this provision is to make the term so created, the prior term in the title, and consequently the term which governs the right to the possession, and to maintain

ejectment, &c. For this reason, in the subsequent deduction of the title, more than ordinary care should be taken, that the assignments of the residue of this term have been regular in point of form, and by persons duly qualified.

The title, under a term thus created, forms an exception to the rule, *qui prior est tempore, potior est jure*; and also to the rule which makes the title under derivative estates, and the order in which they are to confer the right to the possession depend on the estate of the person by whom the derivative estate is granted.

The solution is, that the grant is by way of power under the authority of the act.

Something of the same nature, though in a more limited degree, takes place when terms are created under powers in settlements, and the terms over-reach and defeat estates limited by the settlements.

These examples are in semblance, though, when well understood, are not in fact, exceptions to another rule, *viz. qui non habet ille non dat*, or, as it is variously expressed, *nemo potest plus juris in alium transferre quam ipse habet*.

Leases under powers in conveyances, wills, &c. merely confer the right to the possession, as against all persons claiming under the same settlement, &c. without taking precedence or priority over estates of freehold, attendant terms, and other interests, which were, in point of estate, anterior to the estate of the settler, or other author of the power.

Cases of this sort should always receive particular attention, because they are most likely to deceive those best acquainted with the general rules of property.

*As to Commissions of Bankrupt.*

Also, when a title depends on bankruptcy, the commission of bankrupt should be abstracted, or should appear in the recital of a bargain and sale from the commissioners to the assignees.

The material circumstances are,

The date of the commission :

The names of the commissioners, with the clause of *quorum*, a clause seldom added ; so that it may be considered, whether the authority given to the commissioners has been duly exercised.

In abstracting the bargain and sale, the proceedings are for the most part recited, so as to show,

The commission ;

The trading ;

The petitioning creditor's debt ;

The act of bankruptcy ;

The declaration of the commissioners finding the party a bankrupt, and the time, if any, he stated of the act of bankruptcy ;

The choice of assignees.

And then the deed states,

The bargain and sale from the commissioners



to the assignees, in trust for themselves and the other creditors of the bankrupt.

To these particulars should be added, by way of memorandum, either at the foot of the abstract of this deed, or as part of the title of the deed, that the bargain and sale has been enrolled; and regularly the time of the enrolment should be expressed, since, as to freehold and copyhold lands, no estate passes till enrolment.

And the enrolment must be within six *lunar* months, to bar estates tail, and remainders and reversions expectant on such estates.

While a bargain and sale by the commissioners of bankrupt operates only from the time of execution, other bargains and sales operate either in fact, or by relation, from the time of their execution.

It will be proper to consider the bankrupt laws somewhat more at large.

1st. The relation of the title of the assignees under a commission of bankrupt, is, generally speaking, to the time at which the act of bankrupt was committed; and therefore, if a husband commit an act of bankrupt, and afterwards marry, or sell, the dower of the wife, or title of the purchaser, will be defeated; so if he marry, and then commit an act of bankrupt, and is declared a bankrupt, and afterwards, and before a bargain and sale is executed, he dies, and then a bargain and sale is executed, the title of the assignees will prevail over the title

of a woman claiming freebench, on the ground, that by relation, her husband was not tenant at his death.

For the protection of purchasers, two acts of parliament have been passed. By the statute of 21 James I. c. 19, s. 14, it was provided, " That no purchase for good and valuable consideration should be impeached, by virtue of " any act made against bankrupts, unless the " commission to prove him or her a bankrupt " should be sued forth against such bankrupt, " within five years after he or she should become " a bankrupt." And by the statute of 46 Geo. III. c. 135, s. 1, commonly called Sir Samuel Romilly's act, it was also provided, that in all cases of commissions of bankrupt thereafter to be issued, all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made or entered into more than *two calendar* months before the date of such commission, should, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner, as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt had not, at the time of such conveyance, &c. any notice of any prior act of bankruptcy, by such bankrupt committed, or that he was insolvent, or had stopped payment.

But these statutes, as is evident from their

language, merely afford a protection to *bonâ fide* purchasers ; and the qualifications annexed to these acts, render it extremely difficult to advise a purchaser to accept the title of any trader who is in failing circumstances.

Notice of an act of bankruptcy, or even of insolvency, deprives the purchaser of the protection of the latter act. And a commission of bankruptcy within five years, deprives him even of the protection of the former act ; and a commission of bankrupt within two calendar months deprives him of the benefit of the latter act. There is this material difference between the former and the latter act ; the former gives protection by a lapse of five years to a *bonâ fide* purchaser for a valuable consideration ; so that after five years, unless there be a commission of bankrupt in the mean time, the purchaser acquires a secure title ; but under the latter act, he is not, after two calendar months, subject to the risk of a commission of bankrupt, unless he be a purchaser, with notice of an act of bankruptcy, or of insolvency.

2dly, Respecting the property which may pass by a bargain and sale under a commission of bankrupt.

1st, It extends to real and personal estates, offices, &c. powers of appointment, &c. right to the benefit of equities of redemption, conditions, &c. and it even extends to rights of action ; thus assignees, under a commission of bankrupt, may maintain a writ of entry sur

abatement, and consequently any other real action, *Smith v. Coffin*, 2 Hen. Black. Rep. 444.

And the commissioners have power to bargain and sell lands acquired even after the commission, so as they are acquired before the bankrupt is certificated. But for after-purchased lands there must be a bargain and sale subsequent to the commencement of the title of the bankrupt. The bargain and sale may also operate on estates for years, for life, in tail, or in fee. Terms for years more commonly pass by the assignment of the goods and chattels; and as part of them, without any specific words. It was formerly supposed, on the construction of the statute of 13 Eliz. c. 7, § 2, that a term for years would not pass from commissioners of bankrupt without a bargain and sale indented and enrolled. The note in the 12 Mod. 3, under the name of *Danby v. King*, assumed it to be a settled point, that an indenture and enrolment were essential to make a title under a term of years, from commissioners of bankrupt; but it is now understood to be quite clear, that enrolment is not necessary.

3dly, Estates for life, in tail, or in fee, cannot pass to the assignees, without a deed indented and enrolled; and as commissioners have an authority only, and not an estate, no estate will vest under the bargain and sale until enrolment.

With respect to estates for life, and in fee, no time for the enrolment is prescribed; but it

is likely to be decided that the enrolment must take place in *the life-time* of the assignees, or of one of them. And it is material, that till the assignees have an estate under a deed indented and enrolled, they cannot communicate a legal title to a purchaser.

In regard to estates tail, the seisin passes under a deed indented and enrolled; but the estate tail or remainder will not be barred, unless the bargain and sale be enrolled within six lunar months. The right to bar estates tail and remainders, depends on the statute of 21 James I, c. 19, § 12. The enactments are, “ That  
“ the commissioners, or the greater number of  
“ them, shall have power by deed indented and  
“ enrolled, within six months after the making  
“ thereof, in some of his Majesty’s courts of  
“ record at Westminster, to grant, bargain,  
“ sell, and convey, any manors, lands, tene-  
“ ments or hereditaments, whereof any bank-  
“ rupt is or shall be in any way, seised of any  
“ estate in tail, in possession, reversion or re-  
“ mainder, and whereof no reversion or remain-  
“ der is or shall be in the crown, of the gift of  
“ the king, &c. to any person or persons for the  
“ relief of the creditors, &c. ; and that all and  
“ every such grants, bargains, sales, and con-  
“ veyances, shall be good and available in the  
“ law, to such person or persons, and their heirs,  
“ against the said bankrupts, and against all  
“ and every the issues of the body of such bank-  
“ rupts, and against all and every person and

“ persons claiming any estate, right, title, or  
“ interest, by, from, or under the said bank-  
“ rupts, after such time as such person shall  
“ become bankrupt, and against all and every  
“ other person and persons whatsoever, whom  
“ the said bankrupt, by common recovery, or  
“ other ways or means, might cut off or debar  
“ from any remainder, reversion, rent, profit  
“ title, or possibility into, or out of any the  
“ said manors, lands, tenements or heredita-  
“ ments.”

The principle established by this act, is, that a bargain and sale from the commissioners of a bankrupt tenant in tail, shall have the same effect as any rightful assurance proceeding from the bankrupt would have had.

Thus when he is tenant in tail in possession, and might have suffered a common recovery, the bargain and sale will have the effect of a common recovery, and will bar the estate tail, and all remainders and reversions, &c. expectant on the estate tail.

So when he is tenant for life, with a remote remainder in tail, and consequently, as having the freehold, and also an estate tail, he might by a common recovery have enlarged his estate tail into a fee-simple, by barring the estate tail, and all remainders expectant on that estate. A bargain and sale from the commissioners, duly enrolled, will have the like effect.

But when the bankrupt has an estate tail in

remainder, expectant on an estate of freehold in some other person, then as the power of the bankrupt was merely to levy a fine with proclamations, and bar his estate tail, a bargain and sale from the commissioners will have only the like operation. If the bankrupt had obtained the freehold prior to the bargain and sale, then the power of the commissioners would be commensurate with the power of the bankrupt, and the bargain and sale would operate as a common recovery, instead of operating as a fine with proclamations.

On this statute several difficulties arise, and the points must be considered as doubtful until they shall have been decided.

1st, Suppose the bankrupt to be tenant in tail in remainder expectant on an estate of freehold, and the commissioners to execute a bargain and sale, while the bankrupt is tenant in tail in remainder, this bargain and sale will operate only as a fine.

At a future period, the bankrupt or his issue may be qualified to suffer a common recovery, a doubt then arises, whether a subsequent bargain and sale by the commissioners will produce the same effect as a common recovery by the bankrupt or his issue would have produced. Under these circumstances, the practice is to require a common recovery from the bankrupt and his issue ; for it is not clear that the commissioners, who have merely an authority, and

have once executed that authority, can, by a second bargain and sale, produce any effect on the title.

In another case, *A* was tenant for life, remainder to *B* his son in tail; they were partners, and became bankrupts, and a joint commission of bankrupt was issued against them, and a bargain and sale was made by the commissioners to the assignees; and it was contended, that as the father and the son together might have suffered a common recovery, the bargain and sale from the commissioners should have the like effect as a common recovery. Against this operation it was objected, that the statute of James I. merely adverted to the power of each bankrupt individually; and that the bargain and sale had not any other effect on either estate than if it had been confined to that estate; and that the rule *juncta juvant* did not apply. The case is now under discussion, and to be decided by the chancellor.

In all these instances it is clear beyond all doubt, that a common recovery suffered by the bankrupt, or by the issue in tail, with the concurrence of the freeholder, would have the same effect in barring the estate tail and remainders, as it would have had in case there had not been any bankruptcy.

It is also to be remembered, that commissioners have merely an authority, and not any estate. With respect therefore to copyhold lands on which heavy fines of admission are payable, the



prudent course is to except the copyhold lands out of the commissioners bargain and sale, and to execute a bargain and sale in the first instance, in favor of the purchaser, when a sale shall have been made.

A bargain and sale to the assignees would lead to their admission and payment of a fine; and another fine be payable on the admission of the purchaser. By making a bargain and sale immediately to the purchaser, one fine would be saved, and this saving is frequently an object.

All powers which are for the benefit of the bankrupt, and are an interest in him, may be exercised by the commissioners; but they have not any power over estates of which the bankrupt is a mere trustee; nor can they execute powers which are in the nature of mere naked authorities, to be exercised for the benefit of some third person, as powers of selection, authorities to sell, &c. ; and it is the generally received opinion, that the commissioners cannot execute a power which is limited to be exercised by the bankrupt and his wife jointly, or by the bankrupt and any other person jointly; for instance, if lands are limited to such uses as the bankrupt and his wife should jointly appoint, and in default of appointment to the bankrupt for his life, with remainder to his wife for life, with remainder to their children as they shall appoint, with remainder to their children in strict settlement, as tenants in tail, with remainder or reversion in fee to the bankrupt; the commissioners may, by

their bargain and sale, confer a title to the estate for life, and to the remainder in fee, but they cannot execute the first power, because that power was not exercisable by the bankrupt alone ; and they cannot exercise the second power, because that power was a mere authority, and not an interest.

For the purpose of protecting the interest of the wife, it seems, on a first view, reasonable that the power of the husband and wife should not be suspended as to the estate for life and estate in fee, by reason of the bargain and sale of those estates.

But on mature consideration, it will appear to be the more sound conclusion ; the conclusion most consistent with the principles of law ; that the bankruptcy is an alienation by the bankrupt, and, to the extent of his estate for life and the ultimate fee, is a negative on his right to exercise or join in exercising the power, to the prejudice of this alienation ; so that the power remains in operation on that part only of the fee simple which is not occupied by the estate for life, and the ultimate remainder in fee ; in short, the bankrupt is precluded from assisting in any act through the medium of the power which would defeat the alienation through the act of bankruptcy. See *Goodright v. Cator*, 2 *Douglas* 477.

This observation, negating the right to exercise powers after bankruptcy, must be con-

finer to powers conferring an interest, as distinguished from powers being mere authorities.

Sometimes a title depends on a choice of new assignees. Such new assignees must be appointed under an order of the chancellor sitting in bankruptcy ; and it is not sufficient that there should be an order of removal and an appointment of new assignees ; but there must be a bargain and sale, or a conveyance by lease and release to carry on the title to the legal estate as in ordinary cases. *Blaxham* and others, assignees of *Ward v. Hubbard*, 5 East 407.

By the same case it was decided that the acts requiring registration of bills of sale of ships do not extend to assignments by operation of law, as assignments by commissioners of bankrupt.

On the transfer to be made on the choice of new assignees in the place of some only of the assignees, it is proper to frame the conveyance so as to make the new assignees and the continuing assignees jointenants. An inaccuracy in this respect would not invalidate the title. A conveyance from those who are assignees, *de jure*, with a conveyance of the estate from the persons, whoever they may be, in whom the legal estate is vested, would render the title complete.

### *Of Wills.*

In abstracting wills the following particulars should receive attention ;

1st, *The date* : and the date should be taken from the will, and not, as is sometimes done by mistake, from the letters of probate.

2dly, Any charge imposed for the payment of debts, legacies, or annuities, should be shown; and such annuities, and, in most cases, the legacies, should be enumerated.

Also if debts are scheduled or specified, they should be disclosed by the abstract; but when there is a trust for payment of debts and legacies, and the debts are not specified or scheduled, and it does not appear that all the debts have been paid, there does not exist any reason for stating the legacies specially, since the purchaser is not under any obligation to see that they are paid.

But when it appears, either by a recital, by a report of a master in chancery, or from any other authentic document, that all the debts have been paid, and some of the legacies are known to be unpaid; it seems, from practice, to be the opinion of the profession, that the purchaser is bound to see to the application of his money in the payment of legacies.

Also if the debts become *specified or scheduled* by the act of any of the parties interested in the estate, or by the report or decree of a court of equity, and they have not been satisfied in the mode prescribed by the court, nor has the money been applied under the direction of the court, then there exists a necessity of treating these debts as scheduled or specified debts, and

they should be stated; inasmuch as the purchaser is bound to see to the application of his money.

*Annuities*, though for some purposes considered as legacies, are, in regard to the subject now under consideration, treated as specific charges ; as gifts of a particular interest in the land ; so that the rule respecting the charge of debts, generally exempting the purchaser from seeing to the application of his money in the payment of debts or legacies, does not extend to annuities.

In *other particulars*, the rules prescribed, as proper to be observed in abstracting deeds, are proper to be observed in abstracting wills, except that a will is, in general, from the ignorance of those by whom it is penned, a more irregular instrument.

The points to be attended to are to show, to whom the lands are devised ; the words used in description of the lands ; the words of limitation by which the estate is devised ; the power, if any, in pursuance of which the devise is made ; the words of modification, or of severance of the tenancy, if there be any ; the words of qualification which may abridge or defeat the estate ; the uses and trusts, if any are created ; the conditions, or conditional limitations by way of executory devise, or otherwise, annexed to the devise or appointment ; the charges imposed on the devisee ; the indemnity, if any, against seeing to the application of the purchase-money, or mortgage-money ; such powers, if any, as

are material to the title : and when leasehold lands are the subject of the title, the appointment of executors. And in abstracting each of these clauses, there should be a close adherence to the language of the will, so that a correct opinion may be formed of its construction : and the context should always appear, as far as it may, in any manner, influence the construction, by explaining, enlarging, abridging, or in any other manner affecting the genuine import of the words on which the title more immediately depends. And it is more proper to be diffuse in giving the language of a will, especially one not prepared in technical language, than to attempt to reduce the abstract into a narrower compass, and thus withholding information which may be material.

Indeed, in abstracting wills, it is, from the inaccuracy with which they are frequently prepared, and the want of the regular form which is observed in deeds, of the first importance to add all limitations over, and all clauses which can affect the context, or vary the construction.

How often does it happen, that in wills, words which import an estate in fee simple are, by subsequent expressions, and especially by words of limitation over, qualified into an estate tail, or into a fee determinable by executory devise. And again, words which under the *rule in Shelley's case* import to create an estate tail, are, from other expressions in the will, expounded to give the property to the heir or heirs of the body as purchasers.

Variations of this sort are almost infinite. Hence the importance that every clause which can influence the construction should be abstracted. In numerous instances, the opinions which counsel give on an abstract are very different from the opinions they would have given on a perusal of a full copy or extract of the will.

At the foot of every will it is proper to show at what time the testator departed this life ; the court in which the will was proved, and the time of the probate, as a means, in some degree, of ascertaining the time of death ; and if the lands are in a register county, then the fact, and the time of registration, should be added.

It rarely happens that the time of the death of the testator is stated. This is material in many cases for the purpose of showing at what time the title of the devisee commenced.

This fact, however, is of less importance when the will is proved shortly after the death of the testator, or before any act is done, or conveyance made, to occasion any material change in the ownership.

As to real estate, the probate of the will is given, partly that the inference may be drawn, that the testator was dead before a given time, and partly to direct to the court in which a search may be made for the will ; in case the attorney for the purchaser should think fit to search for the will.

But as to leasehold estates, the probate of the will is of importance, as a step in the title,

since no one can be the executor of an executor, unless the will has been proved by the first executor, and was proved by him in the proper court: though an executor may assign or surrender before probate, yet to prove that he was executor, the will must be proved either by the executor, or by some other person. See Peake's evidence and references. Nor can any one be an administrator *de bonis non* of the first testator, otherwise than by taking letters of administration from the same court in which the will was proved; nor then unless the will was proved in the proper court; with a difference, however, that such administration may be void or voidable according to the circumstances.

Also, if there be a *confirmation of the will* by the heir at law, or any conveyance taken from him, or any proceeding had against him to establish the will, or any interest be left undisposed of, which descends to the heir at law; in all these cases it is material to state who was the heir at law of the testator at his death; and when the circumstances of the case require it, there should be a deduction of the title from heir to heir, or from heir to devisee, and, in some cases, from heir to executor, as for example, where the land is converted into money (*quoad the heir*,) as where the heir takes a lapsed legacy, or part of a residue, as lapsed, or undisposed of, or the residue of trust-moneys by resulting trust.

Also, when any devisee, either in fee, or of a



particular estate, dies in the life-time of the testator, the fact should be stated.

Also, when a will is partially or wholly revoked, or revoked *pro tanto* in equity, the deeds, &c. which are the cause of revocation, should be stated ; and it is most correct to state the deeds, wills, &c. in the order of their date, and not, as is too frequently the case, according to the order of the times at which they respectively operate ; thus placing the deeds which operate in the life-time of the testator, prior to the will whose operation is suspended till his death.

Also when the fact warrants it, it is usual to state that the testator died without having altered or revoked his will ; or without having altered or revoked the same as far as relates to the lands in question ; or except as to some particular legacy, or particular lands.

*Codicils*, &c. which revoke a will, should be given according to the order of their dates ; and if they vary the state of the title, they should be stated as separate and independent instruments.

Also, when a codicil *republishes* a will, the date of the republication should be added ; and it is more proper to add it as a separate and independent fact, according to the order of its date, than by a memorandum at the foot of the will.

Also, when a will is proved in the court of chancery *per testes*, that fact should either be noticed generally, as when that was the sole

object of the suit; or it should be noticed in abstracting the decree of the court; when that decree may be material to the title on some other account.

Also, as to wills and codicils referrible to the title of real estates, it should be stated either in the introductory part, or at the foot, of the abstract of these instruments, that the same were executed not only in the presence of, but were also *attested by*, three witnesses.

### *Of Probates.*

At the foot of every will it should be shown in what court, and by whom, the will was proved, and also the date of the letters of probate; and when a person claims as the executor of an executor, or the executor of a surviving executor, it should be shown that the will was proved by such first executor or surviving executor; and the representation should be carried on by showing probate of the will of the only executor, or the surviving executor, in each gradation of the succession. And when the executor, or surviving executor, dies intestate, there should be an abstract of letters of administration *de bonis non*, of the first testator.

To make out a representation by an executorship to a surviving executor, the fact of his survivorship should be shown by certificates of burial of his co-executors before his death.

But unless the title has been varied by intermediate acts, it does not seem to be necessary to show the letters of administration obtained by each successive administrator.

Mistakes are sometimes made in deducing the title under letters of probate, when there are several executors. It is common for one or more of the executors to renounce the probate, and then the other executors prove, and die in the life-time of the disclaiming executors. In this instance, the disclaiming executors must either prove the will, as they may do, or they must renounce the probate, and if they renounce the probate, administration *de bonis non* must be granted.

These observations are dictated by a consideration of the following points ;

1st. No one becomes, till probate in a court of competent jurisdiction, complete executor for transmitting the succession ; and consequently, unless he has proved the will, his executor will not be the executor of the first testator ; but there must be an administration generally, unless some executor proved ; and if any executor proved, then letters of administration *de bonis non*.

2dly. A renunciation by all of several executors will make an absolute intestacy ; and letters of administration, with the will annexed, must be granted. If there be several executors, and all prove, the executor of the surviving executor will become the executor of the first testator ;

with this exception; before the probate of the will of his own testator, not afterwards, he may disclaim to be the executor of the first testator.

If there be several executors, and some renounce, and some prove, those who have renounced must, in the event of their being the survivors, prove the will, or renounce; and till they have renounced, letters of administration, with the will annexed, cannot be granted with effect.

If the representation is to be carried on by executorship, it must be shown that the executor was appointed by the survivor of the several executors, including those who renounced, as well as those who proved; and if the surviving executor proved the will, then the gradation is, *A* and *B*, executors of *C*, who proved the will of *D*, and was the *only executor*, or the *survivor of the executors* named in his will; and so on progressively through the whole line of succession from executor to executor.

The letters of probate, if they state the fact, are considered in practice, as evidence of the fact. Even in courts of justice they are full evidence of the facts they state; but if the facts are mis-stated, or can be controverted, a purchaser might make such mistake a ground of objection to the title.

Letters of probate, &c. do not form any essential part of a title to real estate derived under an authority to executors to sell.

*Of Administrations.*

WHEN the personal representation to deceased persons is material, as it is in all cases respecting chattels real or personal charges, and the person died, either originally or eventually intestate, the letters of administration of his effects should be abstracted. They may be general or special, and they should be abstracted accordingly. They should show the date of the letters of administration; by whom they were obtained; out of what court, namely, a court of competent jurisdiction; and the subject of the administration, as, all the goods, chattels, and credits generally, or all the goods, chattels, and credits of *A*, left unadministered by *B*; or the goods, chattels and credits of *A*, as far as relates to a particular term for years.

*Of Decrees, &c.*

WHEN decrees are material to the title they should be abstracted. Sometimes it is even convenient to abstract the bill on which the decree is founded, so far as it states the facts of the case, and the material parts of the prayer of the bill.

Sometimes also it is very proper to state some material fact from the answer, as the state of the pedigree, &c. as disclosed by the answer, or some question raised by the defendants.

The decree itself should be stated so far only

as it materially affects the title, as, by declaring the will of real estate duly proved, or the trusts thereof to be performed ; decreeing a redemption ; a foreclosure, or a partition ; or directing a sale in performance of trusts ; or a mortgage to be made ; or portions to be raised ; or compelling the defendant to elect ; ordering an account to be taken ; new trustees to be appointed, and the former trustees to be discharged ; and to execute conveyances, &c. &c.

And as often as there is a direction for the application of the money, the mode in which the money is to be applied under the decree should appear on the abstract.

To the decree should be added the report of the master, ascertaining any fact under a reference to him ; the purchase at a sale before the master ; the price offered ; the allowance of the master ; and the confirmation by the court of the report ; exceptions to the title ; and the order made on arguing the exceptions.

So, when the accounts are material, to show the amount of an encumbrance, or the like, the report of the master, ascertaining the state of the account, and the balance, and the order confirming the report, should appear on the abstract.

- In all cases of reports, it should be shown, that the report was confirmed by order of the court, or over-ruled on exceptions. And such interlocutory orders of the court as direct the

application of the money, are particularly proper to be abstracted.

And whenever money is paid into court, and it is incumbent to see that it has been so applied, and there is not any subsequent order which recognizes the payment, the fact of payment should be stated from an office-copy of the accountant-general's certificate.

In short, whatever may elucidate the title, and show the rights or interests of the parties, their encumbrances, and the extent of them, are properly introduced into the abstract, from the proceedings in chancery ; and the more recent the proceedings in chancery, the more important it is that their substance, and the material parts, should be given in such manner that their effect and influence on the title may be fully comprehended.

#### *Of Judgments, &c.*

WHEN judgments affect the title, or are assigned, and kept on foot to protect the title, they should be noticed on the abstract ; and to the judgments, when assigned, should be added the assignment and declaration of trusts.

It rarely happens that the solicitor for a seller discloses, by the abstract, judgments obtained against his client, or any of his ancestors, or testators, or former proprietors.

When they are known, or when there is not any outstanding estate by which the purchaser

can be protected from them, under the circumstance that he is a purchaser for a valuable consideration, and without notice, it is the duty of the vendor's solicitor to furnish the purchaser with an abstract of the judgments.

It is to be remembered, that judgments are charges by way of *lien* in equity from the time at which they are recorded; and at law from the time at which they are docketed; and from that time, or, which last happens, from the time of ownership in the defendant the *lien* attaches. And as judgments obtained prior to the commencement of ownership, affect the seisin when acquired, the search for judgments should sometimes be extended beyond the commencement of the ownership.

The general rule is to search for judgments for ten years; and if any judgment appear within that time, to search for ten years from the time of the more early judgment; and in like manner for ten years from each judgment, which shall be found; stopping, in all cases, at the period when the owner became adult, unless there be reason to suspect there are judgments against him while a minor.

The result of a judgment is sometimes an execution by *elegit* as to freehold lands, and an execution and sale as to leasehold lands. Under the execution by *elegit* there arises an estate, in the nature of a chattel interest, to continue until the debt shall be paid; and under an exe-



cution and a sale of a term of years, a title will be conferred for the residue of the term.

Of these subjects, a more enlarged view will be taken in a subsequent part of this work.

It is also the duty of the solicitor for the purchaser, except in the cases which will be noticed in the sequel of these observations, to search for judgments, and to satisfy himself, that there are not any judgments (except those which are disclosed to him,) which can affect the title.

Of the same description are recognizances, statutes merchant, and of the staple, debts of record, and debts to the crown, by bond or recognizance.

In register counties the search should be of the register for encumbrances, by judgments, recognizances, and the like. As to lands in other counties, it is the practice to search the warrant-of-attorney-office for judgments in the common pleas, and the judgment-office for judgments in the king's bench; and in the exchequer-office of pleas for judgments in the exchequer; and the seal-office for statutes merchant, &c. in chancery; and with the clerk of the staple, in those cities and towns which have a staple.

By the statute of 4 and 5 William and Mary, c. 20, it was intended to protect purchasers from judgments, unless they were docketed in the mode prescribed by that statute.

It was the object of the several register acts, to produce the same benefit in point of security to purchasers of lands in counties having a

register. And at law no judgment is binding on a purchaser unless it be docketed ; and as to lands in register counties, unless the judgment be registered. But as these judgments, &c. are valid against the defendant, whether they are registered or not, or whether they are docketed or not, they are treated by courts of equity as encumbrances against every purchaser who can be affected, by notice before the completion of his purchase, of the lien subsisting under the judgment, &c. See *Davis v. the Earl of Strathmore*, 16 Ves. 419.

#### *Crown Debts.*

By the common law, every debt to the crown on record, becomes from the time at which the debtor is indebted by record, a lien on his real estate, with a relation to the time at which the debt appears on record. The statute of 33 Hen. VIII. c. 39, § 2, extended the lien of the crown to debts to the king by *bond*, or other specialty ; but as to leasehold estates, a sale before the teste of the writ of execution will be good against the crown. See *Sir Gerard Fleetwood's case*, 8 Rep. 91 ; but an attendant term, though assigned in trust for the purchaser, will not protect against a debt to the crown.

By the statute law, the crown has been armed with several privileges for better securing its debts ; and the law on this subject is very

material to titles. It is necessary only in this place to state, that in all cases in which a vendor, or a former owner is likely to be, or to have been, indebted to the crown, there should be a search for crown debts. It often happens, that as *sureties*, persons are indebted or bound to the crown, on whom suspicion would not readily alight.

Lands of receivers of the crown, being immediate accountants to the crown, (see 13 Eliz. c. 4,) become, by *virtue of their office*, and from the time of their appointment to the office, and not merely from the time of their becoming indebted, liable to a lien of the crown; so that sales by such receivers, before they become indebted, may be defeated by debts subsequently contracted. Acts of parliament are sometimes found necessary to relieve a title from all lien of the crown, on account of these receivers.

*Of the Circumstances which should be stated in explanation of the Abstract.*

It has already been observed, that explanations of this sort are generally introduced into the recitals of a subsequent deed, and are to be collected from them. And though these recitals do not keep up the chain of the title, as regularly as if the circumstances of the title were stated in the order of their dates, as separate and independent facts; yet when these facts appear in the recital of a deed of a distant

date, and these facts have been acted on, or acquiesced in, they are, in a high degree, satisfactory, since they remove all doubt concerning the existence of the fact, or its accuracy. With a view, however, to connect the title, and to preserve a regular chain of its evidence, it seems preferable to give the facts, in the order of their date, or by way of explanation of the facts, &c. to which they relate; and it may be averred, that these facts appear in the recitals of a certain indenture, bearing date, &c.

In considering the different parts of the abstract, notice has been taken of several circumstances proper to be noticed by way of explanation. To these should be added, whatever fact may materially vary the state of the title, or show that it has been regularly deduced;

Of this description are,

1st. The death of *A*, who was tenant for life.

2dly. The death and failure of issue of *A*, who was tenant in tail.

3dly. The return of *C* from Rome, when his estate is to determine, or the estate of another person is to commence on that event. And as often as the time at which the event takes place is material, as it frequently is, with a view to the operation of a common recovery, suffered by a person whose estate commences in possession, by the determination of a prior particular

estate ; or the right of a person taking as heir, devisee, or executor, &c. to make a conveyance or will, levy a fine, suffer a recovery, &c. ; whether dower or curtesy has attached ; or a merger has taken place ; or a contingent remainder has been destroyed ; the time of the determination of the particular estate, or the death of the ancestor, testator, &c. should be expressed.

Also, to show the application of settlements, wills, &c. in regard to the persons for whom provision is thereby made, the number of the issue, &c. should be mentioned ; so that it may appear what were the interests to which they became entitled under the settlement, will, &c. ; and if their shares or interests have been varied by death, &c. the events which have caused this variation, should be noticed.

The facts also of survivorship of two or more persons, taking as joint-tenants, either as trustees, or beneficially, or as executors, &c. ; or of one of several persons taking under a limitation to the survivor of several persons, being the objects in whom an estate given to a class of persons vested, is a proper subject to be expressed in the abstract.

In short, every circumstance which may afford any light on the state of the title, or to account for the deduction of the same, ought to appear as part of the history of the title. And on many occasions it is proper that the facts which depend on extraneous circumstances, should be authenticated by certificates, of baptism,

burial, marriage, and the like ; or by the affidavits of persons to whom facts are known, which do not admit of being verified in any other mode ; as identity of persons, and of parcels, possession, seisin, &c. &c.

Also, in complicated titles, depending on a deduction by descent, from a remote ancestor, there should be a pedigree of the family, as the only means of rendering the state of the title clear and perspicuous. And when the title is derived under a remote remainder or reversion, which was devisable by each successive owner, the time of the birth and death of each person who for the time being was the heir at law, should be stated, as far as it can be ascertained.

Sometimes also, in the abstract of the deed or will itself, it is useful, and of great assistance to the person by whom the abstract is to be perused, and to whom the state of the family cannot otherwise be familiar, to aver the fact, that the contingency did or did not happen, in this or the like form, *viz.* “ In an event which “ did not happen, namely, in case *A* should “ die in the life-time of *B*, then, &c. ;” or, “ In “ an event which did happen, namely, in case “ *B* should die in the life-time of *A*, &c.”

During the continuance of particular estates which are determined, various acts may have taken place, which cease to have any effect after the determination of these estates. The rule is, *cessante statu primitivo, cessat derivativus*.

As a general proposition, the conveyances of particular tenants whose estates are determined, may be disregarded and omitted out of the abstract. But there are many instances in which these acts may have an influence on the title to the inheritance ; and so far they are to be added to and form part of the abstract. For example, *A* is tenant for life, with remainder to *B*, in tail ; *A* assigns to *C*. Suppose *A* and *B*, or *A* and *C*, to suffer a recovery after such assignment, the assignment should be stated ; in the former of these cases, that the defect in the recovery may appear ; and, in the latter instance, the assignment should be stated, to show the competency of *C* to assist *B* in suffering a valid recovery.

So *A* may, by feoffment, or fine or recovery, have divested the remainder or reversion ; or a tenant in tail may have discontinued the inheritance ; each of these acts may materially influence the title to the inheritance ; and under these and all other like circumstances, the acts of *A* should appear on the abstract as constituting part of the evidence of title to the inheritance, even after the determination of the estate of *A*.

Experience proves, that a great number of titles are defective, from the circumstance, that a recovery has been suffered, with the assistance of a person as tenant for life, after he had aliened his estate for life, by way of mortgage, or as a security for an annuity ; and conse-

quently, after he who remained the apparent owner no longer, had the right to assist in suffering the recovery.

These are the leading observations to be regarded in preparing abstracts of title; and these observations, with others which will readily suggest themselves, as the circumstances may dictate, will direct the attention of the gentleman by whom it is to be compared, on the behalf of the purchaser, to take the necessary cautions in seeing that the abstract is complete, and in supplying any defects or omissions.

It is more particularly the duty of the solicitor of a purchaser, embracing under this term a mortgagee, to see that no fact is stated on light foundation, or without being warranted by some authentic or reasonable evidence.

It is also his business to take care that, though the abstract be correct, as far as it is stated, no provisions are omitted which may materially vary the state of the title; and for this purpose, it is his duty, first, to peruse the abstract; and secondly, to peruse the deed or will from which the abstract is prepared. This is a tedious business, and it is too frequently committed to the care of persons who have not sufficient interest to discharge their duty with care, or sufficient information to perform it with judgment.

In general, every deed, &c. should be read by one person, in comparison with the abstract



held by another person ; or the abstract should be read to the person who is perusing the deed, &c.

The practice in preparing abstracts seems to have taken a turn by no means favorable to the interest of purchasers. The professional emoluments arise from preparing the abstract, and not from examining it. It is now prepared by the solicitor for the seller. Formerly it was prepared by the solicitor for the purchaser ; and this, as far as the point of accuracy is in question, is the more eligible mode, since the deeds were left with the purchaser's solicitor, and they were abstracted at leisure, and he had sufficient time to take care that all the material parts were inserted in the abstract.

It is to be feared that now, in some instances at least, sufficient time is not allowed, or if allowed, cannot be devoted by the solicitor for the purchaser to read over and compare the voluminous deeds constituting the evidence of a title, which has experienced a frequent change of ownership, or been fettered by various encumbrances. To understand one deed thoroughly, and all its various operations, combined as they may be with numerous external circumstances, will sometimes engage the attention of those most skilled in the subject, for the greater portion of a day, and require frequent recurrence to the subject before the contents can be perfectly comprehended. What then can be expected from a person who is at once

to wade through deeds, wills, &c. which run to the length of several hundred skins, and a short abstract of which alone comprises from fifty to a hundred pages.

It is a subject of surprise that more inaccuracies do not occur; and that more defects than are experienced in titles do not exist. Did clients know the care and attention devoted to their concerns, in the progress of a faithful discharge of duty, in the completion of any transaction of difficulty, connected with a title to real property, they would be more sensible, than they seem to be, of the value of the assistance of those whom they employ.

The points to which the solicitor for the purchaser should also attend with particular care, are, to see that the will, if any, appears to be duly attested; and that the deed is executed by the persons named in the abstract, as executing the same; and that the execution by them is duly attested according to the general rules of law, unless a particular mode be required; and then in the mode required; or is attested in the mode noticed in the abstract; and that the receipt, if any is indorsed for the consideration money, is duly signed; and that the deed, if professed to be enrolled, was duly enrolled; and finally, that the deed was on the *proper stamps*: a head of investigation which now requires great accuracy, and a minute knowledge of the stamp laws.

*Of Abstracts of Title to Copyhold Lands.*

HITHERTO the observations which have been made have been more immediately applied to lands of freehold tenure ; but the general rules are equally applicable to lands of copyhold tenure.

The deduction, however, of the title to copyhold lands generally depends on a customary mode of conveyance, and of admittance by the lord.

These customary conveyances are,

1st, Surrenders to the use of a purchaser, or surrenders to particular uses, or surrenders to the use of a will, &c. and a will made pursuant thereto, and the admittance thereupon.

In general a copyholder cannot transfer his estate by a common law conveyance, but such common law conveyance, except in the instance of a lease warranted by the custom of the manor, or a lease for one year, which, unless restrained by custom, is warranted by the rules of the common law, will be a forfeiture of the copyhold tenement. But there are several instances which may be considered as exceptions to the general rule, and in which a common law conveyance will operate with effect ; thus, one of several joint-tenants may release to the other ; so a person having a mere right, or an inchoate interest as a contin-

gent remainder, may release to the copyhold tenant, or may release to the lord.

2dly, An authority to sell, created by a will under a surrender to the use of that will, may be executed by a sale made by a deed, and the bargainee will be entitled to be admitted.

3dly, Under the statutes relating to bankrupts, and other special acts of parliament, as the land-tax acts, a bargain and sale enrolled may be the only efficient mode of transferring the copyhold estate. These observations are applicable only to alienations of the legal estate; for the equitable owner of a copyhold interest not being tenant in tail, or a married woman, may bind his or her interest by any deed or contract.

It is observable also, that entails of copyhold lands, whether they affect the legal or the equitable ownership, may be barred in the mode prescribed by the custom. They may be barred by a surrender, and even a surrender to the use of a will, unless some other mode, as a customary recovery, or the like, be rendered necessary by the particular custom of the manor.

It is also to be noticed (though the contrary is to be found in *Mr. Watkins's* valuable book on copyholds) that there cannot be any entail of the equitable ownership, except in those cases in which the legal ownership of the same lands might be entailed. See *Pullen v. Middleton*, 9 Mod. 494.

Every abstract relating to copyhold lands

should show the date of each surrender and admittance, the person by whom the surrender was made, the admittance, or the grants by the lord upon forfeitures, &c. and, either by special words, or by reference, the lands which are surrendered, or to which admittance is granted. It should also show the admittances of the heir as such ; and the proceedings which are had under customary recoveries, to bar legal or equitable entails ; and also all special covenants and agreements, even in deeds and other instruments, which may materially affect the equitable title ; also the surrenders made to the use of wills, and whether they are made to the use of the will generally or specially, as to the use of the will made or to be made.

It should also state the wills (if any) made in pursuance of such surrender, and when the lands of copyhold tenure are specifically devised under circumstances which will entitle a court of equity to supply the want of a surrender, as in favor of a *child*, a *wife*, or a *creditor*, for it will not supply the want of a surrender in favor of a grandchild, a husband, or a stranger, except so far as he is a creditor, or may raise a question of election, by imposing on the customary heir the obligation in equity, of either giving effect to the disposition, or waving in favor of the disappointed devisee, the lands which are devised to the heir, such will, &c. should be abstracted.

Also inclosure acts, which substitute allotments of land in lieu of lands formerly of copy-

hold tenure, are with propriety introduced into the abstract.

When freehold and copyhold lands are intermixed, or constitute part of the same farm, or are sold together to the same person, the abstract generally shows, in the first place, the state of the title to the freehold lands, with the covenants, &c. which affect the equitable title to the copyhold lands; and the legal title to the copyhold lands is given in a distinct abstract, so as to disclose the transactions which have taken place in the copyhold court.

When copyhold lands are enfranchised, and the copyhold tenure becomes extinct in the freehold tenure, the evidence of the title should, to be complete, show the state of the title under the copyhold tenure, and also the state of the title under the freehold tenure; for the copyhold tenure exists in point of right for the benefit of all persons who can make title to the same, or show any encumbrance under this tenure. And as the copyhold tenure is extinguished, the freehold tenure governs the right to the possession; and the judgments, &c. and other encumbrances of the owner of the freehold tenure may be considered as affecting the actual possession, as far as it is discharged of the copyhold tenure. In this respect there is a great affinity between the learning of merger, by which one estate is absorbed in another, and *extinguishment*, by which one tenure is annihilated in the other.

In the observations to be made on the state

of the title, as falling within the province of the conveyancer, the different modes which have been adopted to guard against the total annihilation of the copyhold tenure, so as to prejudice the title by accelerating the encumbrances of the owner of the freehold tenure, or by blending one title with the other, will be considered.

It frequently also happens that different copyhold lands are parcel of different manors ; in this case there should be a distinct abstract of the title to the copyhold lands, held under each distinct manor ; as being the most convenient arrangement that can be made for simplifying the evidence of title.

This, however, is so universally the practice, that any caution on the subject may appear altogether unnecessary.

*As to Lands of the Tenure of ancient Demesne.*

Very few observations are material to be offered on this head, as the general rule for preparing abstracts of lands held in common socage tenure, are equally applicable to lands of the tenure of ancient demesne, except that it would be proper to notice any acts which have been done by the tenant, with or without the consent of the lord, to render these lands frank-free, viz. common socage tenure ; and also whether the acts so done remain in force, or have been avoided, as they may be, by a writ of deceit, when the lord is not bound by these acts.

The abstract, when it concerns lands and tenements of the tenure of ancient demesne, ought to state that fact in the head or title of the abstract, because a fine cannot, at least without an express custom, (Jenk. Cent. 87. Dyer 373,) be levied of lands in ancient demesne to bar an estate tail, *Hunt v. Bourne*, 1 Salk. 339.

It may be frequently necessary, either in judging of a title, or in advising on the means of completing it, to treat a fine as ineffectual, while it would be a sufficient assurance if the lands had not been of the tenure of ancient demesne.

The principal object of introducing this head into this place, is merely that those points shall be raised by the abstract, which ought to be considered, and will be suggested by the observations to be made on this subject.

*Of the Points to which attention is to be paid in considering the Abstract, and advising on the state of the Title.*

THIS part of the subject includes more immediately the duty of the conveyancer or counsel.

The object, in every abstract of title, should be to show the precise state of ownership, of the persons by whom the sale or mortgage is to be made.

It ought to disclose the history of the title,



and all material circumstances attending the same, and the charges and encumbrances by which the title is affected.

This will more particularly appear in the observations which have been suggested on the proper form of the abstract, and on the particulars, to which attention is to be paid in preparing the abstract.

It is the duty of the conveyancer to consider the deduction of the title; the evidence by which it is supported; the defects, if any, which appear in the title, or in its evidence; and to call for such information as shall appear necessary to elucidate the real state of the facts; and also for such documents as, in the nature of the case, may exist, although no notice, or only very slight notice, be taken of them in preparing the abstract.

This may appear to be a duty attended with little or no difficulty; but it will be found to involve, within its compass, the knowledge of all the rules of real property, and all the niceties with which these rules abound.

In short, no one ought to deem himself qualified to advise on the state of a title, till he has informed himself fully on the doctrine of the law concerning estates, their quantities, as in fee, in tail, &c. &c.; their qualities, as jointenancy, &c.; the degrees of ownership they confer, as the right of tenant in tail to bar reversions, and remainders, as well as the heirs in tail; the incidents to which estates are liable, as dower curtesy, &c.;

the modes by which they may be conveyed, determined, forfeited, or extinguished ; the modes by which a title may be changed from one person to another, either by conveyance, (namely, deed or will,) by the act of law, as *descent*, &c. or by the tortious or wrongful act of a stranger, as *disseisin*, or of a particular tenant, as *wrongful alienation* by tenant for life, or *discontinuance* by tenant in tail.

He must also be prepared to distinguish with accuracy between legal and equitable estates ; the different modes by which these estates arise or are transferred ; and the distinctions which are allowed in application of the law to one species of interest and the other.

As a general proposition, it is in vain that he should first read his abstract, and afterwards, except on special points, endeavour to inform himself of the law. In this mode very little progress could be made in the dispatch of business ; his abstract might remain in his hands for a period which would exhaust the patience of his client. It is not, by this observation, intended to insist, that a conveyancer should be expected to solve every difficulty which may arise, without any recourse to his books.

All that is intended to be expressed is, that he should be prepared to see the difficulty, to raise the question in his mind, and to refer to the authorities by which that difficulty shall be solved, as far as it admits of solution, or at least to show that the point admits of so much

doubt that it does not allow of a decisive opinion.

In short, no case, except one of extraordinary difficulty, ought to arrest his career in perusing the abstract ; combining its different circumstances ; deciding in his own mind on the operation of each deed as it is perused ; and comprehending its influence on the state of the title, or at least the doubt to which it exposes the title.

This degree of skill is to be attained only by an enlarged and extensive course of reading ; by digesting, and preparing to apply, the bulk of the laws on real property, and in particular those which concern the *ability* and *capacity*, and, in the result, the disability of persons, as infants, married women, &c., and of the respective owners of different estates, as tenants in tail, &c., the effect of conveyances by them respectively, and the course of transmission, or succession on the descent, or devolution of the estate.

The rules for the exposition of deeds and wills, as the technical means by which they are to be construed, and their effect ascertained, are also to be studied with particular care.

It is frequently necessary, first, to decide whether a person be tenant in tail, tenant for life, or in fee ; whether he be a joint-tenant, or tenant in common, or tenant by *entireties* ; whether he has a vested or contingent remainder, or an interest by *executory devise* ; whether

he has a legal or an equitable estate ; whether he has an estate, or power, or an authority ; before any safe or satisfactory conclusion can be drawn on the subsequent parts of the title.

Frequently, also, it is necessary to consider whether a person has an estate, or merely a right or title of entry, or of action ; consequently, whether he is seised, or has been dis-seised ; also, whether an estate which was vested has been divested ; and whether an estate which existed has been discontinued, or turned into a right of entry ; whether a seisin which has been converted into a right or title, has been restored by entry, by action, or by that operation of the law which is called remitter.

Also, whether a particular estate which existed has been determined by the lapse of time, or by filling the boundary by which it was circumscribed, or measure of time which it was to complete. Also, whether it has been determined by surrender, merger, or entry for a forfeiture ; and whether an interest, limited by way of contingent remainder, has been destroyed, released or extinguished ; and whether a more remote remainder or reversion has been barred under the ownership, which the law confers on the person who has a prior estate ; being a learning peculiar to estates tail.

This summary will disclose to the reader, that a large field of inquiry is open to his research, and invites his studies ; and that some portion of labour is necessary to enable him to qualify

himself to perform his duty with credit to himself, or with justice to his client.

There was a period when, in some particulars, this duty was attended with more difficulties than at present ; while, on the other hand, the increase, in modern times, of law books, and, in particular, of Reports, has added to the difficulties, by enlarging the field of the student.

The assistance to be derived from several of the publications of the last thirty years, will not only abridge the labour of the student, but enable him, with reasonable certainty, to attain that correct knowledge of the subject which, without those aids, he could not have attained, at least, in the same space of time, nor with the same degree of certainty ; for without any imputation on his judgment, he might have adopted many of those errors which are unavoidable on the part of a person who is studying the law, without any assistance, and without the aid of methodical treatises ; and also without any means of discarding those propositions which were formerly considered as law, but have been over-ruled, explained, or modified by modern decisions.

The heads of the law to which particular attention is to be paid, are those which will be found in the *Commentaries of Blackstone*, in the four last chapters of the first volume, the several chapters of the second volume, the 1st, 2nd, 10th, 11th, & 27th chapters of the third volume,

and the 29th chapter of the fourth volume of that excellent work. The student should take these chapters as a great outline, and fill up that outline by reading the different treatises written on the different subjects of some of these chapters, particularly *Fearne* on Contingent Remainders and Executory Devises; *Butler's* notes on Coke upon Littleton; *Cruise* on Fines and Recoveries; *Watkins* on Copyholds and Descents; *Gilbert's* Tenures; *Powell* on Devises, Powers, Mortgages, and Contracts; *Bacon, Saunders*, and *Cruise*, on Uses; *Sugden's* Vendors and Purchasers; *Sugden* on Powers; the Law of Evidence (than which no subject is more useful to the conveyancer); *Booth* on Real Actions; so much of *Comyns's* Digest as relates to these actions; and finally, the different heads on the different subjects of real property, which are to be found in *Comyns's* Digest; *Sheppard's* Abridgment; *Bacon's* Abridgment; and *Viner's* Abridgment.

Nor should the student be without *Sheppard's* Touchstone, a book which of itself is a comprehensive library of the law on the Assurances of Property, given in clear and perspicuous terms, with comparatively few errors; a work excellent for its method and arrangement; and those heads of law which are not embraced in the Touchstone may be supplied from *Sheppard's* Abridgment.

In short, a person intimately acquainted with the contents of *Sheppard's* Touchstone, and who

has made himself perfectly master of the same, may, with the assistance of some of the modern treatises, congratulate himself on having attained a very large portion of that knowledge which will be useful to him in the exercise of his professional duties.

In *Sheppard's Touchstone*, the chapter on the Exposition of Deeds, the chapter on Grants, and the chapter on Testaments, are particularly deserving of his attention, as containing those rules of construction, without which it is in vain to attempt to go through an abstract of any length, or of any difficulty, with a chance of success.

The rules of law construction and exposition which are collected in the different books of maxims, and also in *Wood's Conveyancing*, will be found particularly useful. As a manual, a little book, intitled, "*Principia Legis et Æquitatis*," (by *T. Branche, esq.*) contains more law, and more useful matter, than any one book of the same size which can be put into the hands of the student. *Mr. Barton's Elements* will also be found an useful part of the law-library of a conveyancer. The student, however, will do right to use these, and other works of the like nature, as a species of index, and only as assisting him in his studies. He will always trace the law to its fountain head by reading the Reports and the Text-books, or other authorities from which deductions are drawn. Thus he may satisfy himself that these deductions are correct before

he implicitly relies on them. Any work which is calculated to abridge the labour of the student by bringing the points under each head into one view, and under an arrangement calculated to enable the student to find that of which he is in search, with the least possible delay and loss of time, is of more value than can be easily conceived by any persons, except those who, from practical experience, have learned its importance.

The observations on the extent of study, necessary to qualify the conveyancing lawyer, are not made for the purpose of damping the ardor of the student, or to overwhelm him with the magnitude, or the difficulty, of the pursuit.

They are suggested merely to point out the extent to which his researches are to be carried.

In proportion, however, to the exertions which are made will be the satisfaction to be derived, and the fruits to be reaped, from these exertions.

It is obvious, that it will require several years to complete a course of reading which shall embrace all the subjects to which reference is made; and to comprehend and apply the learning involved by these subjects in a scientific manner.

As it happens, however, to a few only to have their time fully occupied by the duties of the profession, in active practice, at the commencement of their career, the young conveyancer has generally sufficient leisure to form his opi-



nions correctly before they will be called into extensive use. And, in proportion as his business shall increase, he will, by the assistance of experience, feel qualified to acquit himself with credit, should the interval be diligently employed ; and at first he will be able, from his abundant leisure, to supply, in a great measure, any want of more extensive knowledge, by minute attention, by reflection, and by inquiry, among more experienced men ; so as to avoid any flagrant errors.

Still, however, a considerable portion of knowledge should be acquired before any attempt be made to apply that knowledge to actual practice ; since an important error committed in the early part of life is not easily forgotten. Besides, irreparable injury may be done to those who have relied on such assistance, and committed their whole fortune, and sometimes confided the pledge of their future industry to his judgment.

The great object of the student should be to employ his time in the most beneficial manner ; and at first to confine himself to those points which may be of more immediate use to him ; and to leave abstruse learning, and those heads of the law which are nearly obsolete, and which serve rather for illustration than actual use, till an occasion of practice or leisure may invite his attention to them.

There is one point, however, to which a person thus circumstanced should pay particular

attention. In the early part of his professional career he should consider it not only as his duty, but as his interest, when a question arises in actual practice, which involves any head of learning on which he has not fully informed himself, to consider this as the proper time, as far as his leisure will admit, to study the subject fully, and pursue it through all its distinctions.

By these means his opinions given on the particular case will, in all probability, be correct; at all events, respectable; and he will have an opportunity, should he wish it, of treating the subject at least in a masterly manner; and (this is a point of still more importance to himself, with a view to his future success,) he will be better prepared to advise on the same subject, when it shall again be presented for his consideration.

With a view to this mode of study, modern treatises are of inestimable value, as containing the recent and ancient authorities on the subject brought into contrast; also accurate criticisms; and pointing out those distinctions by which cases apparently differing in principle are to be reconciled.

As aids in the same pursuit, the Digest of Chief Baron *Comyns*, and the Abridgment of *Bacon*, will be of considerable use; but lastly, and finally, the student should always make a point to go to the fountain head, by consulting those authorities which he has discovered in the progress of his studies, and which appear to be

more immediately applicable to the case on which he is to advise ; for it is a truth ! a lamentable truth ! that few books in the law are so precise as to be positively correct.

After pursuing this course, a gentleman must have mistaken his talents, and the line of profession in which his exertions may be judiciously employed, or he will be competent to all the duties of his profession.

All knowledge should be founded on principle ; and from first principles, and general rules, the student should descend to particular cases, and to exceptions.

The student should be particularly careful to select his general rules and first principles from the most approved authorities. He should take care also, and this can be done only by extensive study, and close application, to collect the technical sense of these rules ; and to understand them, not according to the literal terms, but according to the sense in which they are received by eminent lawyers. He should also be careful not to adopt the opinions of counsel as used in argument, any further than they shall appear to be warranted by the authorities to which the counsel refer, or the principles which they state. In short, he must not take any thing upon trust. He must examine every proposition with care, before he suffers it to influence his mind, or to become the rule of his professional conduct.

It is a misfortune which attends the study of

the law, that few propositions admit of mathematical demonstration; and definitions, and legal propositions are expressed, for the most part, in such vague and indefinite terms, or with so little attention to positive accuracy, that a long time must elapse before the student will be prepared to understand many of the best writers in the sense in which they must be understood, to render their propositions correct in law.

In a regular course of reading, the student should, either in his own mind, or by an actual arrangement, analyze the different legal definitions, should show their application, the sense in which they are understood, the exceptions of which they admit, and the distinctions which arise out of modern determinations.

The mode of doing this is pointed out by *Fabian Phillips*, in his little book on the study of the law; and it will be found an useful exercise for the purpose of information and of study.

Even to commit to paper, in different language, the substance of that which has been read, with the distinctions which present themselves, and the doubts which are suggested in the mind, will also tend greatly to improvement. And in reading the Reports on any particular case it would be useful, by a marginal note, to extract, and set down in writing, the precise point of the decision, and the different resolutions to which the court came in forming their judgment.

The great object with those who wish to qualify themselves in a short time, to enter into actual practice, is to consider by what means they may with the greatest ease, and at the most early period, attain that portion of knowledge which will justify them in taking on themselves the active duties, and the responsibility, great as it is, of the profession.

There are scarcely any two persons who will agree on the precise mode of study, which may be pursued with most advantage.

The opinion formed on the subject, from extensive experience and observation, is, that a person thus circumstanced, should, in the first place, acquire a knowledge of the general heads of the law, their divisions and subdivisions. For this purpose, the *Analysis of Blackstone* and of Lord *Hale* are of incomparable value.

The next point is to fill up this outline, and to dwell with more than ordinary care on those heads which are most useful. This course should lead the student to consider the nature of property, as divided into real and personal estate; and also the division of real property into corporeal and incorporeal hereditaments. On this subject the chapter of *Blackstone's Com.* vol. 2, c. 2. 3. and the notes of Mr. *Powell*, in his edition of *Wood*, will be of great value.

Mr. *Barton* has also collected all the principal points on this subject; but it is not by any means necessary that the student should, for the present, enter into all the detailed learning which

concerns the nature of incorporeal hereditaments. It is sufficient for his purpose fully to comprehend the different natures of the different property ; the sense in which the words real and personal estate are used ; the substantial differences between lands, tenements, and hereditaments ; in other words, corporeal, or incorporeal hereditaments, so that he may be prepared to understand the application of the rules of law which are founded on the distinct nature of the different properties.

In this place, also, it may be right to acquire a general knowledge of the doctrine of courts of equity, which, through the medium of trusts, consider lands as converted into money, and money as converted into land, for the benefit of certain persons claiming under a trust declared by the owner of the fund.

On this subject, a chapter in Mr. *Barton's* Elements may be read with great advantage.

The doctrine of Tenures will, perhaps, be supposed to fall next in order for consideration.

It is an interesting subject ; illustrates the laws of real property ; and renders the study of the doctrine, as it respects the nature and incidents of estates, more scientific. But to the practical conveyancer it is of less value than has generally been supposed ; and it may be investigated with more advantage, and with more convenience, after the student has obtained a complete knowledge of the nature and qualities of estates, and

the modes by which they may be conveyed, transferred, &c.

The next subject to which the student should direct his attention is the difference between estates; as they are of freehold, and not of freehold; as they are of inheritance, and not of inheritance.

The doctrine respecting the freehold is of such infinite importance to the conveyancer; so many cases are referrible to this learning; it so materially affects the qualities and incidents of estates, the modes by which they are to be recovered, transmitted, and conveyed; the effects of some assurances, as fines and recoveries; and the incidents of estates, as dower, curtesy; and the nature and denomination of the injuries to estates, as disseisin, abatement, intrusion, and discontinuance, that too much attention cannot well be bestowed on this subject; and therefore it is worth the labour to enter fully into this learning; especially as it may be read without any great exertion of the mind, and understood after a few hours, or at the utmost a few days, close investigation.

For want of any other digested or connected arrangement of the subject, reference is necessarily made to the chapter on Freeholds in the *Essay on the Quantity of Estates*.

In studying this subject the student should not be content with reading the chapter to which he is referred. He should examine the autho-

rities which are quoted ; and this will not be a waste of time. These authorities are not only relevant to the particular head, but lead him, slightly, at least, to consider other subjects which will occupy his attention in the progress of his studies, and will become useful in opening to his mind the reason of the law, and the policy of our system of tenures.

The subject which next deserves the attention of the student is the quantity of estates ; the duration of the interests they confer ; the assurances by which they may be created, limited, or transferred, and the words which are necessary to the creation or the limitation of these estates.

On this subject the student should dwell with particular attention, and make himself completely master of the several heads ; since, in every moment of his professional life, he must have recourse to this learning, and apply it to practice.

On this subject he should read the first part of the text of Littleton, and commentary of Coke ; paying attention more particularly to those parts which are selected in *Hawkins's* Abridgment of Coke upon Littleton ; since he has selected the parts most material to a modern lawyer.

And the general principles and leading cases on these subjects will be found in the *Essay on the Quantity of Estates*.

Should the student have occasion to extend his researches on this subject, he must consult



*Bacon's* Abridgment, under the heads Estates and Legacies, and *Comyns's* Digest, and *Viner's* Abridgment, under the same titles. To these he may add *Mr. Cruise's* Digest.

Though this may appear at first to be a subject which would require a long course of reading, yet with close application, and with a mind zealous to understand this branch of the law, and carrying in full remembrance the general rules collected in the *Essay on the Quantity of Estates* ; it will be found, that if the subject be methodically studied, it may be thoroughly understood in a much shorter time than can be easily imagined ; and in pursuing this study there would, at the same time, be acquired, a large portion of useful knowledge ; in short, the great difficulty of studying the law before it was reduced into a methodical arrangement will, in effect, have been surmounted.

The next head of the law to which attention may be paid, is that which concerns the *qualities of estates*, as they are vested or contingent, in possession, reversion, or remainder, executed or executory.

These heads of the law are fully treated of in *Blackstone's* Com. vol. 2, ch. 11, and *Bacon's* Abridgment, chap. Remainders ; and *Mr. Fearne's* incomparable Treatise on Contingent Remainders and Executory Devises.

As preparatory aids in this study, may be read, with some advantage, that part of the introductory chapter in the *Essay on the Quantity of*

*Estates* which treats of this subject. Also the tract on the difference between estates which are executed and executory, and the succinct view of the rule in Shelley's case.

As books of reference for particular cases, recourse must also be had to the abridgment of *Bacon* and *Viner*, and the Digest of *Comyns*.

Having made this progress, the student will find that he has acquired a large portion of useful knowledge. He will begin to comprehend the nature of our system of tenures, the reasons on which they depend, and their connection, as part of an excellent system of laws founded on principle, and not depending merely on, or flowing from, arbitrary decision.

In this course of reading he will necessarily have his attention frequently drawn to the nature and qualities of estates, as held in severalty, in jointenancy, in coparcenary, in common, and by entireties; and as he might fall into important errors if he were not to make himself acquainted with the precise nature of these qualities, and the consequences which flow from them, he should now study this branch of the law with particular care.

On this head he should read the several chapters of *Blackstone* on the nature of these tenancies: *Littleton*, and the Commentary, still taking *Hawkins's* Abridgment, as his guide to the parts which are most useful; and if he means to enter more deeply into the subject, as he will find it his interest to do, he should read these

heads of the law as they occur in *Comyns's Digest*, *Bacon's Abr.*, and *Viner's Abridgment*.

He will find a short summary of the same subject, with some of the more material distinctions, in the introductory chap. of the *Essay on the Quantity of Estates*.

The synopsis of *Littleton*, as published in some of the editions of *Coke Littleton*, is also a work which greatly facilitates the study of the subjects in *Littleton*.

The learning on descents, and on titles by succession, marriage, devise, testament, executorship, administration, bankruptcy, custom, forfeiture, &c. will now invite his attention.

On the doctrine of descents he should read the chap. on that subject in 2 *Blackstone's Com.*, and next Mr. *Watkins's* excellent and detailed *Treatise on Descents*. To these books he should add *Robinson's Treatise on Gavelkind*; as showing the nature and history of customary descents, and the distinctions to which they give rise; also he will do right to refer to those passages in *Coke Litt.* which treat of these points; and he will find the chap. *Descents*, and *Heir and Ancestor*, in *Bacon's Abr.* and the titles, *Descent*, and *Heir*, in *Viner's Abr.*; and the title, *Discent*, in *Comyns's Dig.* of considerable use. This subject is of so much importance, as are the other subjects which relate to succession, transmission, &c.; that it is absolutely necessary to become perfectly familiar with them.

The great points in successions by descent

are the *possessio fratris* ; the difference between actual and legal or constructive seisin ; the question of who shall be deemed the purchasing ancestor ; and the necessity that the person claiming as heir shall be of the blood of the first purchaser, and of the *whole* blood of the person last seised.

The system of *Blackstone* in propounding the rules of descent, and detailing the reasons on which they are founded, and his universal preference, as far as relates to the first purchaser, of the paternal to the maternal line, gives to this subject an interest which will be sensibly felt, and places it on a basis which renders every part of this doctrine consistent in principle and application ; while the opposite doctrine, which, in some cases, introduces proximity of blood, as entitled to a preference over worthiness of blood, defeats, to that extent, the preference of the paternal to the maternal line ; and destroys the system, by placing it on the foundation of technical reasoning, and the rule of convenience adapted to a particular case, rather than a general plan ; while a general plan, having symmetry in all its parts, ought to be the foundation of all laws.

In tracing the doctrine of descents, even into its most minute parts, no time will be lost. Every part of this subject will be found useful for the purpose of actual practice, for illustration, and to afford a scientific knowledge of the subject ; and it is in this part of the law that

the doctrine of tenures, and the connection between our system of laws, and the feudal system, will deserve particular notice.

All, however, that is necessary for the English lawyer to read, is the chap. in *Blackstone* on the feudal tenures, Mr. *Butler's* note on the same subject, Sir *Matthew Wright* on tenures, and so much of *Sullivan's* lecture on the feudal law, as more immediately relates to this subject.

In this place, also, the doctrine of the tenures of this country, and particularly the difference between freehold and copyhold tenures, tenures in ancient demesne, and by custom, and between the ancient and modern tenures, especially the alteration made by the statute of *quia emptores*, 18 Edw. I. stat. 1, c. 2, and the statute for the abolition of military tenures, except the honorary parts thereof, 12 Cha. II. c. 24, will merit attention. On this subject, should be read *Blackstone's* Com. 2d vol., chap. 5, 6; the titles, Tenures, Homage, Seignory, in *Comyns's* Dig. the introductory chap. of Mr. *Watkins* to *Gilbert's* Tenures; also part of *Gilbert's* Tenures; the 2d part of *Coke Litt.*; the head Tenures in *Bacon's* Abr.; and, as greatly helping the memory, and also assisting the judgment on this subject, Mr. *Fearne's* ingenious chart of Landed Property.

The subject of Copyholds will also merit more close investigation; and on this branch of the law Mr. *Watkins's* treatise contains nearly every thing that is useful; and it is hardly too much

to say of it, that it is one of the most useful practical books in the law.

An useful supplement to that work would be a collection of the points which peculiarly apply to copyholds under customary grants for lives.

Any further aids which may be wanted will be found in Lord Coke's Copyholder, the *Lex Customaria*, and the title Copyholds, in *Comyns's Dig.* and *Bacon's Abr.* Some useful forms will also be found in *Fisher's Copyholder*, and more in Mr. *Scriven's* recent publication.

The title by marriage is the next subject to be studied. This head of the law involves all the learning to be found in the Abridgments and Digests under the title Marriage, and Baron and Feme.

*Blackstone*, vol. 1. chap. 15, should be read on this subject; and all the other useful knowledge will be found in *Comyns's Dig.* title Baron and Feme; and in *Bridgman's Thesaurus*, under the same title.

To these may be added, whenever any extensive research may be necessary, the same heads in *Bacon* and *Viner's Abridgment*.

Some useful knowledge on the same subject will be found in Mr. *Butler's Annotations on Coke upon Littleton*.

This head of the law, and the relations between husband and wife, are still more fully and amply discussed in a book, intitled, *Laws of Women*; a book which seems to have experienced a neglect by no means consistent with

its merit. It is the most comprehensive, and, with reference to any single work, the most useful treatise on this head of the law. In a book, or rather two volumes, published by Mr. *Bridgman*, under the title *Thesaurus Juridicus*, there is a very useful collection, in chronological order, of the cases decided in equity, on points arising from the relation of husband and wife. Had that work been completed it would have formed one of the most useful books in the lawyer's library.

The next head to which attention must be paid is titles by succession to real property by devise, and to personal property by executorship, bequest, intestacy, and distribution. Under the same head should be studied the due administration of assets of a deceased person.

On devises, as far as respects the external circumstances, and the modes of execution and attestation, the student should read *Powell on Devises*. As to the exposition or construction of the internal parts of the will, and the words by which estates may be limited or created, or determined, or defeated as to one person for the benefit of another person, the principal cases will have been read under the doctrine of estates ; also, in the treatises on the learning of contingent remainders and executory devises.

This subject requires the most minute attention. To go fully into the investigation, the chap. Testament in *Sheppard's Touchstone* ; the titles Devise and Wills in the Abridgments and

*Digests*, and *Gilbert* on *Devises*, should be read with particular care.

On the subject of executorship and administration, every thing which is useful will be found in *Toller* on *Executors*. *Blackstone's Com.* vol. 2, ch. 32, should also be read. To these add *Sheppard's Touch.* title *Testament*, and the head *Executor* in the *Digests* and *Abridgments*, and *Mr. Wentworth's Office of Executors*. No branch of the law seems to have merited, or to have received, more attention than the office, duty, and power of executors. The importance and daily occurrence of the subject, called into activity by the death of every person who has any property, has induced professional gentlemen, from time to time, to employ their labours on these heads of the law.

On administration of assets, the more useful knowledge will be found in the books which treat of executors and administrators. To these add the title *Assets and Administration* in *Comyns's Digest*; *Bacon* and *Viner's Abridgment*; *Bridgman's Thesaurus*; and *Lovelace* on the *Will* which the law makes; also *Blackstone's Com.* 2d vol. c. 32.

Some useful cases on the same subject will be found in *Comyns's Dig.* in the different subdivisions under the title *Chancery*.

On bankruptcy, all that is material will be found in *Cooke and Cullen*. The head *Bankrupt* in *Bridgman's Thesaur.* also deserves to be occasionally consulted.



On title by forfeiture, *Blackstone's Com.* and *Comyns's Digest*, under the head *Forfeiture*, afford all the knowledge which will be requisite in general practice. In *Hawkins's Pleas of the Crown*, a still more copious discussion on the law and consequences of forfeiture will be found.

The statutes of limitation, which after certain periods bar the right or some particular remedy, are also well deserving of particular notice. The statutes should be first read ; next the commentary on them to be found in *Blackstone's Commentaries* ; the title *Temps* in *Comyns's Digest*, and the title *Limitations* in the *Abridgments*. Mr. *Cruise's* Essay on Fines, in that chapter which details the decisions on the statute of nonclaim on fines, should also be studied. These statutes may with propriety be considered as part of the same system as the statutes of limitation.

On the earlier statutes of limitation there are many useful points in *Brooke's Reading* on the Statute of Limitations.

The doctrine of uses and trusts should be now studied with particular attention, as giving rise to many of those niceties and distinctions which render the acquisition of legal knowledge difficult to those who have not made themselves acquainted with the differences between conveyances at the common law, and conveyances to uses ; and those assurances which owe their legal effect to the doctrine of uses. He must also learn to distinguish accurately between

limitations at the common law ; limitations of use which may be executed into estate by the statute of uses ; and limitations of trusts which remain equitable interests ; and he must learn what conveyances are particularly adapted to these different species of property, as the modes by which they may be transferred. He should first read the Statute of Uses, and afterward Mr. *Cruise's* Treatise on this subject, or the chapter on the same subject in his Digest ; next the chap. on Uses in *Sheppard's Touch.* ; afterwards *Saunders* on Uses ; and finally Lord *Bacon's* reading on this statute ; and Mr. *Sugden's* edit. of Chief Baron *Gilbert's* Treatise on Uses and Trusts.

In the progress of studying this abstruse branch of the law, Mr. *Butler's* notes in *Coke* upon *Littleton*, on Uses and Trusts, will be found of inestimable value. To open the learning on the same subject, *Blackstones's* Com. 2 vol. ch. 20 ; and that part of the introductory chap. of the Treatise on the Quantity of Estates, which gives an outline of the doctrine of uses and trusts, may be read with advantage. The notes in a former part of this volume, and those in the 1st and 2nd volumes of the *Practice of Conveyancing*, to which a reference is made by the index, title Uses, at the end of these volumes, will aid this pursuit.

As connected with the same subject, and as forming a branch of the law peculiarly applicable to this learning, the doctrine on Powers

will require a considerable portion of attention; *Powell* on this subject, and *Mr. Butler's* notes in *Coke* upon *Littleton*; the title *Poiar* in *Comyns's* Dig. and letter l. 2, 3, 4, 5, in the title *Uses*, in the same Digest; and *Mr. Sugden's* very valuable Treatise on Powers, should be read; and at the same time the doctrine of authorities, arising under particular acts of parliament, as the land-tax acts, and bankrupt laws, and authorities given by will to executors to sell freehold or copyhold lands, should be studied.

On this subject of powers, and also on uses and trusts in general, there are some useful notes in *Mr. Fonblanque's* Treatise on Equity.

At this period, unless it has been already done, the doctrine of the law respecting perpetuities, will merit a full portion of attention. Much useful learning will be found in *Mr. Fearne's* Treatise on Executory Devises; also in *Mr. Hargrave's* Annotations in *Coke* upon *Littleton*, and in his juridical arguments on the case which arose on *Thellusson's* will. *Mr. Butler* also has contributed a large portion of information on this subject in his notes on *Coke* upon *Littleton*, and his edition (p. 562) of *Fearne*.

As connected with this subject, should be read the statute of 39 & 40 Geo. III.; and the note on that statute, written by the author of these observations, and which *Mr. Butler* has published in his edition of *Fearne's* Contingent Remainders, &c.

The next subject to be considered is the

form of assurances, *inter vivos*. These should be divided into assurances of record, and assurances not of record.

Of the former description are fines and recoveries. On these heads of the law, Mr. *Cruise's* Treatise on Fines and Recoveries, and the chapter on Fines and Recoveries in *Sheppard's* Touchstone, are by far the most useful books the student can read. But in searching for particular cases, *Viner's* Abridgment, and *Comyns's* Dig. title Fines and Recoveries, and *Bacon's* Abridgment, under the head Fines and Recoveries, must be occasionally consulted.

On the forms of deeds connected with these assurances, and on some of the purposes to which these assurances are applied, the practical notes on fines and recoveries, which form a part of the *Treatise on Conveyancing*, may possibly afford some assistance; and as throwing light on the same subject, as far as respects estates tail, the tract on Alienations by Tenant in Tail will be found useful. Mr. *Watkins's* Principles, chap. on Fines and Recoveries, will also assist the student in his researches on this abstruse branch of the law.

As to deeds which form so large a portion of the transactions in life;

The first object is to consider their external parts or circumstances, viz. the materials on which they are to be written, and the circumstances of signing when positively required; and in all cases, sealing and delivering, together

with the evidence which must be given in support of the execution of the deed to prove its validity.

Signature is not essential to a deed, either by the rules of the common law, or the statute of Frauds and Perjuries.

On these external ceremonies, should be read 2 *Blackstone's Com.* chap. 20; *Sheppard's Touch.* chap. 3; and *Peake's* and *Gilbert's Treatise on Evidence*.

Should it be necessary, on any particular occasion, to extend the inquiry, all the useful knowledge will be found in *Comyns's Dig.* and *Viner's Abridgment*, title Facts; and *Bacon's Abridgment*, titles, Grants and Obligations.

In the next place, the component parts of a deed should be considered, *viz.* The names of parties, the recitals, the *testatum* clause, including the consideration; the grant, including the words of grant and words of description; the exception; the habendum; the limitation of use; condition; the declaration of trust; the covenants, and the clause of "In Witness," &c.

All the rules which relate to the greater part of these heads will be found in *Sheppard's Touch.* *Blackstone's Com.* and in the Abridgments and Digests, under the title Facts and Grants.

The head Covenants will generally be found under a distinct title; and it is of infinite importance, with a view to preparing deeds, and sometimes construing them, to be conversant with this head of the law.

The chapter on exposition of deeds will necessarily form a part of the present subject, as showing the rules for construction referrible to deeds, and ascertaining their legal operation. It remains only to consider the different species of assurance by deed.

They should be divided into,

1st. Deeds operating solely by the rules of the common law.

2dly. Deeds operating partly under the rules of the common law, and partly through the medium of the statute of uses ; and,

3dly. Deeds operating wholly under the doctrine of uses.

Of the first description are,

Feoffments ;

Grants ;

Leases ;

Assignments ;

Surrenders of particular estates ;

Surrenders of copyhold lands ;

Bargains and sales in execution of common law authorities ;

Exchanges ;

Confirmations, and Releases, either of right, or in enlargement of estate, or by way of extinguishment.

Of the second description is the assurance by lease and release, and all conveyances operating by the rules of the common law, with uses superadded, and to be executed into estate, through the medium of the statute of uses.

Of the third description are,  
Covenants to stand seised to uses ;  
Bargains and sales of an use ;

Appointments in exercise of powers contained in conveyances to uses ; and deeds of revocation in exercise of powers for that purpose.

Declarations of uses of a fine and recovery strictly fall under the second head of division, as forming part of one entire assurance, constituted of a conveyance by the fine or recovery, and of the declaration of uses.

There are some instruments also which may affect the equitable title, though they have not any operation on the legal estate.

Of this description are articles previous to marriage. In short, all bonds and contracts, and all agreements for a valuable consideration, whether contained in deeds, or in writings merely under hand.

An equitable title may also arise from payment of purchase-money, or from any other cause which gives to a party the right in equity to call for a conveyance of the estate.

The title also may be encumbered, or affected by various operations, acts of parties, or of law ; for instance,

By seisin ;  
Ouster ;  
Disseisin ;  
Discontinuance ;  
Descents which toll entry ;  
Entry ;

Continual Claim ;  
Warranty ;  
Merger ;  
Extinguishment ;  
Remitter.

And it may be encumbered by various means, as by debts to the king, by ownership, in a person being a debtor and accountant to the crown, although no debt exists ; judgments docketed, and in equity, by judgments, of which there is notice, though the judgments are not docketed ; by statutes merchant, statute staple ; by decrees in equity ; by a charge created by will for payment of debts, or any particular sum of money ; by liens, or charges in equity, arising from *contract*, as articles to sell, articles to settle, &c. &c.

And these charges may cease by release, or by satisfaction or compensation, or by waiver, or abandonment.

On the different species of assurance, the 20th chapter in 2d vol. of *Blackstone*, and also *Sheppard's Touchstone*, should be first read ; afterwards *Coke Litt.* under the title Release and Confirmation ; and the notes of Mr. *Butler* in *Coke Litt.* ; and these notes will be found particularly instructive.

To these annotations should be added *Watkins's Principles* ; the several chapters at the end of *Saunders on Uses* ; Mr. *Cruise's Digest* ; and the several titles in the Digests and Abridgments, under heads expressive of the different assurances.



With respect to the particular form of each instrument, and a general outline of its use, the *Treatise on Conveyancing* will, it is hoped, be found of some value.

On seisin and disseisin, much valuable learning will be found in different parts of *Coke Litt.* especially in the chapters on descents, which toll entries, continual claim, discontinuance, and remitter ; also by referring to the index, title Seisin and Disseisin. The index in *Hawkins's Abridg.* title Seisin and Disseisin, will also be useful ; and *Comyns's Dig.* title Seisin, will afford considerable assistance to the student.

The argument in *Goodright v. Forrester*, 1 Taunton, 559, contains a general outline of this learning.

On discontinuance, the chap. on that subject in *Coke Litt.* and the points collected in *Comyns's Dig.* under the same head, will afford the information proper to be obtained. The *Digest of Comyns* should be read as a step preparatory to the study of *Coke's Commentary*.

As connected with the same subject, read the chapter in *Coke Litt.* on Continual Claim, and Remitter, and Descents which toll entry ; also *Gilbert's Tenures*, and *Comyns's Dig.* The doctrine of warranty, and statute of limitations, are also relevant to this head of the law ; and the learning on the subject should be extracted from *Gilbert's Tenures*, *Coke* upon *Littleton*, chap. Warranty, and the cases, as they are digested by *Comyns*, under the title Warranty.

As a directory to the more useful matter in *Coke upon Littleton*, the abstract of the text by *Hawkins* will be of great use, and the analytical digest by way of index to that abridgment will be found particularly useful. The value of *Comyns's Digest* consists, in a great measure, of the arrangement, and for the ready access it affords to *Coke upon Littleton*, and the Reports, for the point under consideration.

The like observations apply to the doctrine of remitter, and the mode of studying this head of the law.

As to the king's debt, consult *Viner's Abridgment*, title Prerog., *Comyns's Digest*, title Debt; and also the statutes by which the common law has been altered. To these books may be added *Sheppard's Abridgment*, title Prerogative.

As to judgments, *Tidd's Practice* affords the most useful information. On statutes merchant, statutes staple, and recognizances, *Sheppard's Touchstone* contains more information than any other book.

The different heads on this subject in the Abridgments should also be consulted.

On charges for payment of debts, &c. the head Trusts in the Abridgments, and the head Charge in *Viner's Abridgment*; Mr. *Butler's* note to *Coke Littleton*, on Uses and Trusts; *Comyns's Digest*, title Chancery, under the subdivisions, will be the proper books to be read.

The more useful learning on the subject is at present scattered in the Reports.

To go through this course of reading, to collect all the principles, to understand the distinctions, and to discover the exceptions, will require the study and the close application of many years. And to a person who has time before him, that time cannot be more advantageously employed than in sifting each head of the law to the bottom, as far at least as it can apply to general practice. Each subject will be found to illustrate another; at least to constitute a part of it, and render each successive head of the law more interesting, more familiar, and more easy.

But to a person with whom it is an object to acquire a competent share of knowledge for actual practice, within a short time, as two or three years, the course of study to be recommended is to read *Blackstone's Commentaries*, with a view to general principles, and; which is of infinite importance, the excellent arrangement of that work; also, all the books to which he refers as authorities, so far only as they are material to the point for which they are quoted; and at the close of each chapter to read *Mr. Watkins's Principles* on the same subject; next *Wooddeson's Vinerian Lectures* on the same head; and finally, the corresponding titles in *Comyns's Digest*, and *Sheppard's Touchstone*.

With proper attention in reading these books, the chances are, that the person who shall pursue this course of study, will, at the end of two years, feel himself equal to the general business

of his profession, and capable of forming a sound and correct opinion on the general points which occur in practice.

But that he may be an accomplished lawyer, and equal to those difficulties which continually present themselves in the course of extensive practice, the more enlarged course of reading which has been recommended will be necessary; and the leading cases in the Reports should be uniformly consulted, before any decisive opinion shall be formed on any point that appears doubtful, or is involved in considerable nicety. In cases of this nature, the Abridgments and Digests should be considered only as indexes to the Reports. And it is of infinite importance that a person in actual practice should be familiar with the decisions which have taken place in the courts of justice, within the last century; and as leisure will admit, research should be extended through the preceding century, so as to carry them back to the time of the Reports of *Plowden*, which may be considered as the first book of Reports of any excellence; and indeed, as the name imports, a very learned commentary in arguments by counsel, and judgment of the court, on the several points which came into discussion.

Indeed, there is contained in the Reports of *Plowden*, and of Lord *Coke*, more sound law and useful matter, at least to the conveyancer, than can be found in the works of any two other reporters to be named; or perhaps in any two books of the law.

In considering the duties of the conveyancer, in regard to abstracts of title,

1st, The commencement of the title.

2dly, The progress of it.

3dly, The evidence by which it is supported.

4thly, The mode of analyzing the Abstract.

5thly, The conclusions to be drawn from the whole abstract, are the principal points to be considered.

In this investigation many repetitions of former observations will occur; they are permitted to remain rather than interrupt the chain of arrangement. In a book designed for practical use, these repetitions are not only allowable, but are highly useful.

*As to the Commencement of the Title.*

THE general rule is to take care that there is evidence of a title, placed within the power of the purchaser, so as to afford to him a reasonable expectation, that he may hold the estate without interruption, and free from all claims which, in the nature of things, can be made.

The leading points in a title are, that no one can give that which does not belong to him; in other words, *qui non habet ille non dat*; and the estate granted by every person will determine at the same time as the estate of the grantor will determine.

This rule is expressed in these terms, *cessante statu primitivo cessat atque derivativus*. The exceptions to this rule create some of the many

difficulties which arise in understanding titles ; for instance, tenant in tail may, by a common recovery duly suffered, acquire the fee simple ; or by a feoffment or fine, operating by discontinuance, he may gain a fee simple, without acquiring a good title to such fee simple.

Again, a tenant for life, by a tortious alienation, by feoffment, fine, or recovery ; or tenant for years, or for any chattel interest, by feoffment, or a stranger by deisseisin, intrusion, or abatement, may acquire a wrongful estate ; thus the estate or seisin ; not merely the possession ; may be in one person, and the right or title of entry, or of action, may be in another person.

Few points are in modern times more important than to distinguish between those acts which are a mere dispossession, and those which constitute *disseisin* ; very erroneous notions seem to prevail on this subject.

This wrongful estate may become a good title by the release, including, when circumstances, as an entail, require it, a fine with proclamations, or recovery of the rightful owner ; or the seisin may be defeated, and the right of entry may, by entry ; or the right of action, may, by action, judgment and execution, or by remitter, again become the seisin or estate.

These points must be considered more at large, in observing on that part of the abstract in which the power of the grantor is to be discussed.

Except in particular cases, in which the want

of such evidence may be accounted for, as the destruction of title deeds by fire ; the continuance of an estate in the same family for a long series of years, without family settlements or wills ; a purchase made for convenience of a small portion of a large estate ; or the like ; the evidence of the title should commence with the deed of conveyance, will, or settlement, made about the period of sixty years, by the person, who at that time appears to have been the absolute owner.

To carry back the evidence beyond this period, often occasions an useless investigation, and an unnecessary delay and expense. But there are cases in which it is not only proper, but necessary, that the evidence of the title should be taken up from a more early period. This is particularly the case as often as an entail was created upwards of sixty years since ; and the first deed, falling within that period, relates to the estate tail. Under these circumstances, the creation of the estate tail, and the existing right to bar the same, should be shown ; at least if they be not shown, the counsel for the purchaser should do all in his power to collect the evidence of the creation of the estate tail and the right to bar the same.

At the same time, it should seem, that the want of such evidence does not, of itself, constitute an objection to a title, though it certainly renders the title less eligible.

Also, when a title depends on an estate tail,

or a remainder in fee, which was limited or created upwards of sixty years ago, and has fallen into possession within a recent period, it is important to the title that the deed or will by which this estate tail was created, or remainder limited, although such deed or will was executed at a distance of more than sixty years, should be abstracted.

Also in a title depending on heirship to the first purchaser, the evidence of the title of the ancestor who was the first purchaser should be shown, although he became the purchaser upwards of sixty years since.

Though there be some convenience in the rule which fixes on sixty years as the period at or about which the commencement of the title should be taken; yet, it is not to be concealed, that many titles which appear to be good, during the period of sixty years, would appear to be defective if the more early evidence of title were known. This happens more especially in the instances in which there are particular estates with various remainders over, and an entail is barred by fine instead of being barred by recovery; and also, when there is an estate for years, with remainder or reversion in fee, and a feoffment is made, or fine levied by the termor during the term, and no advantage is taken of the forfeiture. A third instance is, of estates tail of the gift of the crown, with the reversion in the crown. A fourth instance may be put, of titles subject to implied warranty by exchange, or of



estates exchanged with ecclesiastical persons, and other persons incapable of making an effectual exchange.

In all these instances, the title may be defective, notwithstanding the lapse of the period of sixty years ; and sometimes it will happen, that eviction may take place after peaceable possession for a period of more than sixty years, accompanied with deeds and other documents carrying on the evidence of the title with apparent regularity throughout that period.

The case of a title to an advowson is another instance in which the evidence for a period of more than sixty years may be important ; and when there are attendant terms for years, and they were created at the distance of more than sixty years, it is usual, if circumstances will admit, to deduce the title from the period at which the terms were created.

This practice is founded in reason, since it is a rule of law, that the possession of the termor is the possession, or rather continuance, of seisin in the owner of the reversion or remainder-man ; for the reversioner or remainder-man cannot be disseised while his tenant continues in possession ; and even, though the termor be ousted, yet while there is a right of entry, as distinguished from a right of action in the reversioner or remainder-man, a re-entry by the termor will revest the seisin in the reversioner or remainder-man ; but when the reversion or remainder is turned into a right of action, as by a descent

cast, or by a discontinuance by tenant in tail, or the like; then an entry by the termor will not restore the seisin to the reversioner or remainder-man; for it would be absurd, that the entry of a termor should produce an effect which would not be produced by the entry of the person who has the reversion or remainder.

So also, when an appointment is made in pursuance of a power, and that power was made to over-reach estates in strict settlement, the deed creating the power, though dated upwards of sixty years since, ought to be abstracted; or if the deed itself cannot be produced, the language of the power should be stated from the recitals; and this is a reason in preparing deeds of appointment, for stating, by way of recital, the creation of the power fully.

Also, in the deduction of a title to a term of years, created upwards of sixty years since, the deed creating the term ought to be shown, though, as already observed, the want of evidence of the creation of such term does not, after a lapse of a long period, afford an objection against the title.

Also, if the possession has been held by the same person for sixty or even eighty years, as was the case of ——— the commencement of her title, and also of the testator, or other person under whom she derived her title, should, if possible, be shown. For if it should turn out, as it did in that case, that such person had only a particular estate, the title would be defective, notwithstanding the period which had

elapsed; and therefore, more than usual and ordinary evidence may be expected by the purchaser.

Also, in titles derived from a grant from the crown, the grant should be shown, that it may appear that no reversion was retained by the crown; and also, that the nature of the rents and services which were reserved may appear; and that the grant was not in tail, and for services performed to the crown; and consequently, that no impediment arises from a remainder or reversion in the crown.

And if the first deed in an abstract refer to a person claiming as devisee, inquiry should be made for the will under which he derived his title, unless the will be abstracted.

The general rule of taking up the commencement of the title, at or about the period of sixty years, arises from the circumstance, that sixty years is the extreme period of limitation for bringing a writ of right, which is the remedy of the highest nature, and, in many cases, the last resort.

The proposition of *Blackstone* (3 vol. 196,) is, that the possession of lands in fee-simple uninterruptedly for threescore years, is at present a sufficient title against all the world, and cannot be impeached by any dormant claim whatsoever.

By possession must be understood adverse possession, as distinguished from possession under a term of years, or other particular estate.

But this proposition is too general, and for

that reason not correct ; for a title may be defective after a peaceable possession for sixty, one hundred, or any other number of years, although there has been a seisin by wrong of the fee-simple ; and consequently an adverse possession ; for instance, if *A* be tenant in tail, remainder to *B* in tail, remainder to *C* in tail, with divers remainders over, and *A* make a conveyance by lease and release, or by lease, release, and fine, a possession held under this conveyance will never be adverse to those in remainder as long as there shall be any issue of *A*, who might have inherited his estate under the form of the gift ; and if at the end of sixty, or any other number of years, there should be a failure of the issue of *A*, the right of *B* to claim would commence ; and he might make his claim at any time before he was barred under the operation of nonclaim on a fine, (if any) or by the statute of limitations of 21 James I., which allows him twenty years, from the time when his right commenced ; or if then labouring under disabilities, ten years from the time when these disabilities shall be removed ; and even, if the title of *B*, or of his issue, should be barred, either by nonclaim on a fine, or by the statute of limitations of 21 James I., the title of *C* may remain unaffected ; and as his right of claiming does not commence till the failure of the several issues of *A* and *B*, he will be allowed a further period for making his claim, after the failure of such issue shall have happened.

Sometimes there is not any direct evidence of title for more than thirty or forty years; but the state of the title during the preceding thirty years is to be collected from the recitals in a former deed, or from a short history of the title, disclosed in the description of the parcels, or from a schedule of title deeds.

In transactions of small value, which will not bear the expense of nice, critical, and extensive investigation, although the purchase may involve all the property of the purchaser, such secondary evidence, if it appear to have passed through the hands of a person conversant with his profession, and on that point an opinion may be formed from the accuracy of the deed in which such secondary evidence is found, such secondary evidence is considered satisfactory.

But in transactions which will justify the expense, it is proper to call for direct evidence of the deduction of the title; and the deeds, or at least attested copies of them, should be sought for in the hands of all persons most likely to have the custody of the deed or copies.

This search should be directed among the papers of persons who are the present owners of lands held under the same title; also, among papers in the hands of persons who covenanted to produce the title deeds, or their representatives, and of solicitors concerned for the successive owners.

And when an estate has been sold in parcels it has rarely happened that this search has been made in vain. The probability is, that attested

copies at least will be found in the custody of some or one of these persons.

In the case of title to copyhold lands, recourse should be had to the court-rolls; and as to these lands, there cannot be any pretence for limiting the inquiry for any information which may appear to be material, since ready access may be had to the court-books, unless, and this rarely happens, the court-books have been lost, or destroyed by fire.

And as to lands in register counties, the advice should be to search the register for the purpose of obtaining a clue to all the information it can afford.

And as to the estates of Roman catholics, prior to the act of the 31st year of the reign of his present majesty, c. 32, the exact state of their titles may be found enrolled with the clerk of the peace of the county within which the lands are situate, or in one of the courts of Westminster Hall.

When the part of the evidence of title for the last sixty years depends partly on possession, then the production of leases, and enjoyment under them, as evidence of the possession; or, if no leases can be found, the production of assessments to the land-tax, rentals, and even maps and parish-rates, should be required as affording reasonable evidence on this point.

And in this place, it is to be observed, that if the evidence of the title relate to a reversion or remainder expectant on a lease which was made sixty or even one hundred years ago, the

evidence of the title should be deduced from the lessor, because it is a rule of law, that the possession of the tenant is the possession of the reversioner; and that the receipt of rent from my tenant does not disturb my title, consequently the possession is never adverse to me while the lease continues, and the possession is held under the lease; except, indeed, that if no rent was received for sixty years, and no act of ownership in cutting timber, &c. had been exercised during that period, a writ of right could not be maintained by the reversioner, since he had never received what in law are termed the esplees. But though this would be an objection to his maintaining a writ of right, it does not appear to be any bar to his maintaining an ejectment within twenty years after the possession shall fall, or within ten years after the disabilities, if any shall be removed. *Hunt v. Bourne*, 2 Salk. 422, proves that an ejectment may be maintainable in respect of an estate tail, although the remedy by formedon was barred.

When a title depends in its more recent stages on descents, an authentication of the pedigree should be required by evidence; as certificates of baptism, marriage and burial; and in particular cases there should be affidavits by members of the family, or the persons to whom the family were known, respecting the state of the family, and identity of persons; and in regard to noble families, *Collins's Peerage*; and in regard to other families, monumental inscriptions, tomb-stones, and the like, should

be examined; and in some cases, local histories, not as direct evidence, but as affording a clue to more material information.

It is, as already noticed, the better opinion, that a title may be good, even though it depend merely on descent from ancestor to heir, and heir to heir, through successive generations, without any will, settlement, or other conveyance appearing; but such a title should be viewed with particular jealousy, and the courts of record should be searched for fines and recoveries; and the ecclesiastical courts having jurisdiction over the effects of the respective owners, should be searched for wills, letters of administration, and the like; and it is even prudent, that in a case of this sort every aid should be borrowed, for the purpose of guarding the title against latent entails and dormant encumbrances.

In a case so circumstanced, it was, as already noticed, deemed advisable to have a feoffment from the present possessor, and to take a conveyance by lease and release, a fine with proclamations, and a common recovery, from himself, his brothers and sisters; and even with these precautions the title was considered by two eminent conveyancers, on a reference to them for that purpose, as worth no more than two third parts of the value of the estate, with complete and full evidence of its deduction.

No vendor, however, unless in great difficulties, could be advised to submit to such a



sacrifice, without taking the opinion of a court on the sufficiency of his title.

Sometimes an objection has been taken to a title, because a person through whom the title is derived was tenant in tail, and apparently, had the remainder or reversion in fee by descent; and he levied a fine, instead of suffering a common recovery.

The objection proceeds on the ground that the reversion might not have been in him, but might have been aliened or settled. But though these facts certainly call for caution, and should lead to investigation into the title to the reversion, as far as it can be traced; it has been decided (*Sperling v. Trevor*, 7 Ves. jun. 497,) that the objection itself shall not prevail. The decision must be understood to contain the qualification, that the purchaser cannot show that there is an outstanding title under the remainder or reversion in fee.

With this qualification the decision is reasonable, and consistent with all those principles of moral certainty which govern the court in deciding on titles. It was founded on the ground that a mere possibility, which in fact may exist, and not be known to either of the parties; and which, in the nature of things cannot be ascertained by either of them, shall not be allowed to operate as an objection to the title.

Were the vendor in the situation of tenant in tail, with the reversion in fee, by descent, the purchaser might require a recovery to be

suffered, at least, on offering to pay the expense of the recovery.

And under the covenants for further assurance generally introduced into purchase deeds, settlements, &c. the purchaser himself might have obtained, though he might not have had a right to compel the vendor to obtain, a recovery from the tenant in tail, under whom the title was derived. But if the tenant in tail were dead, or under disabilities, this resource would fail.

It has occurred sometimes, that a title commenced with a fine levied, and a deed prepared, professedly for barring all estates tail, &c.; and no estate tail has appeared; and it has been objected, that the title may be bad, because the conusor in the fine might have been merely tenant in tail, and the reversion or remainder might have been in a stranger. But now the prevailing opinion is, that this objection, resting simply on these grounds, cannot be supported. Such language is frequently adopted from some ill applied precedent.

When, however, it is suspected on the behalf of a purchaser, that there is some information in the knowledge of the seller, respecting the state of the title, and which he has not disclosed in the abstract; or that he has withheld some material deeds, the purchaser is entitled to a discovery from the seller of all the information which he can communicate; and this may be enforced by a bill in equity, or under the usual order of reference, that the parties shall be ex-

amined on interrogatories, and produce all deeds in their custody, power, &c.

It may also be repeated in this place, that titles are always received by professional men with greater confidence, in proportion as changes in the ownership have taken place, or successive sales among persons resident in the neighbourhood have been made ; for it is in the neighbourhood in which the lands are situate, and among the occupiers, that the rumours or suspicions of defects of title are most likely to be circulated.

And a subdivision of the parcels among different purchasers, especially among persons who were tenants, adds still further to the probability that the title has been closely and minutely investigated, and fully understood.

On the other hand, there are some exceptions to these reasons for confidence ; and it is the knowledge that these exceptions exist which renders it the duty of the conveyancer, not to be satisfied with a title rested on such confidence.

Lands bought or exchanged for convenience, from a large proprietor, whose family have been the owners for a long series of years, will frequently be accepted without the production of title. Many such instances exist, especially in manufacturing districts.

These lands will be improved by building costly mansion-houses, &c. and these purchases will have been taken from, or exchanges made,

with a gentleman or nobleman, whose property was in strict settlement.

On minute investigation, the title will be found defective, and unmarketable, without any power from circumstances of minority, &c. to supply the defects in the title. Distress, and sometimes ruin, especially to persons in trade, and who want to sell or to mortgage, to obtain money to answer demands on them, is the immediate or remote consequence. The like occurrence sometimes takes place under building leases accepted without any, or without a sufficient, investigation of title, from persons assuming to be absolute owners in fee-simple, but who have encumbered their property by mortgages, or put it into settlement, or hold it under settlement, or under entails not effectually barred.

Titles under west-country leases for years determinable on lives, are often in a similar predicament.

So are leases made in exercise of powers not duly pursued.

Formerly, it was deemed a breach of honour, and a departure from policy, to impeach these leases. Modern notions, and the necessities induced by extravagance, have thrown down this barrier, and confidence is destroyed. Hence the strictness of modern practice compared with the practice of former times. Hence, the importance, and even the necessity of having evidence of a good title in all cases of this description.

But little or no attention should be paid to mere rumours of a defect of title, unless these rumours can be traced to some reasonable source. The vulgar notion of *heir-land*, founded on the doctrine to be found in Glanville, that the person who took as heir could not alien without the consent of the person next in succession; and the impression which many persons have derived, no doubt from the language of the statute *de donis*; and from the effect which that statute obtained, before common recoveries were introduced into general practice, subject many titles, which are really good, to the imputation, among persons of little or no legal knowledge, of being defective; and there are always to be found poor relations of an ancient family, to urge their claims, as being the right heirs. The system of strict settlement on the parent for life, with remainder to the first and other sons in succession; a system which suspends the power of alienation in fee until the concurrence of the eldest son is given, has tended to perpetuate this notion of heir-land among common people.

No doubt many titles are received as good which would appear to be defective, at least disputable, were the real circumstances of the title fully disclosed, or fully known.

On the other hand, the evictions which take place in modern times are very few in number; and many good bargains are lost from a scrupulous nicety in the investigation of titles; ending in their rejection.

The proper course to be pursued, on the part of counsel in giving his advice, is to point out to the purchaser the degree of risk to be run, and leave it to him to decide for himself on the prudence of running that risk.

Few purchasers, however, are justified to themselves, or to their families, in accepting a title, unless the title be, or in the compass of a few years will be, in a marketable state, in point of evidence to a future purchaser, or to a mortgagee.

For want of a marketable title, there is property without the means of converting it into money, or raising money on the security thereof on an emergency.

In requiring that the evidence of the title should be carried back through the period of sixty years, or even a further period, circumstances must materially govern the opinion of the conveyancer.

When, as it has been already observed, there has been a frequent change of ownership from one purchaser to another, and the possession has been uninterrupted, the presumption is very strong in favor of the title, although the evidence disclosed by the abstract does not carry back the history of the title for more than forty or fifty years; especially if the want of the earlier deeds can be accounted for in any reasonable manner; as by the circumstance, that the lands in question are part of a larger estate, or that a fire has happened in the family of one

of the proprietors, or of a mortgagee, or from any like cause.

It is in reference to family estates, in other words, lands which have remained in the same family for a long series of years, and have been the subject of different settlements or wills in that family, and have descended from one member of the family to another, in a long succession, that more than ordinary caution is required. Under such circumstances, the evidence of the title should be carried back as far as circumstances will admit; and at least for a period of sixty years, if the ownership of this family commenced at, about, or before that time. This observation is equally relevant, whether the purchase be made immediately from one of the branches of this family, or be derived under a conveyance made by them within the last twenty, or even thirty years.

In proportion too as the presumption of a good title shall be weakened, from the want of frequent change of ownership; or, in the case of a purchase of part of a family estate, by the circumstance, that the person of that family who was the vendor lived till a recent period, so that there has not been any great length of adverse possession, admitting that he had only a particular estate, should the diligence of the conveyancer be exerted, to ascertain the precise state of the title of the person by whom the sale was made; for if it should turn out, as in practice it sometimes does, that he was only tenant for life, or

that he was only tenant in tail, without having barred the entail, or the remainders over, the title will be open to eviction.

Even the chance that such might have been the condition of the title, suggests the duty of endeavouring to ascertain its precise state; but if the seller died shortly after the sale, and thirty or forty years have elapsed since the sale was made, and no claim has been asserted, the presumption arising from these facts is highly favorable to the title, and leads to the inference, that the person from whom the sale proceeded was competent to make the conveyance under which the title is deduced from him.

Also, though the first deed or will in an abstract be dated at the distance of sixty years or upwards, yet if the parcels are granted by a *general denomination*; as lands purchased of *A*, or devised by the will of *A*, it is the practice to require the production of the deed by which the lands were purchased, or of the will by which the lands were devised; and yet the subsequent evidence may so identify the lands, that no one can reasonably doubt the fact, that the lands were so purchased or so devised.

The like observation applies, in a degree, to lands described in a deed or will by the name of the occupier, as an essential part of the description.

However, it is a general rule, never, except in one case, to suffer a title to lands held in fee, or for lives, and which refers to a *will*, as



part of the means of its deduction, to escape the investigation which the will may afford.

The excepted case is in the instance of a very ancient will ; so that if the will were produced, there would be a long chasm in the evidence of title. Under these circumstances, to call for the production of such will, without being able to obtain the evidence of the intermediate steps in the title, might lead to useless anxiety.

Extraordinary occurrences in the title, as feoffments made, or fines levied, or recoveries suffered, without any apparent reason for these species of assurance, also excite suspicion that there are some material facts in the title, not disclosed by the abstract. Such assurances invite the caution of the conveyancer, and suggest the propriety of a research into the history of the title in every channel through which it can be traced.

With a view, therefore, to practice, in preparing deeds, it is prudent, whenever the circumstances will admit, without injury to the title, to disclose the reason for making a feoffment, levying a fine, or suffering a recovery, so as to remove those grounds of suspicion which otherwise might attach ; for instance, when a fine is levied, or recovery suffered, merely for caution to guard against dormant entails, the motive of levying the fine, or of suffering the recovery, should be stated ; and it should be distinctly expressed, that there is not any knowledge of any entail.

Also, when a fine is levied by a *husband and wife*, the legal presumption would be that the lands were the inheritance of the wife, unless the contrary appeared. Therefore, in declaring the uses of the fine, or in the deed of covenant for levying the fine, it should be stated that the lands are the inheritance of the husband, when the fact will warrant it, or the recital should be varied so as to be adapted to the fact.

In deeds dated at the distance of 30, 40, or 50 years, there may be found a covenant from a husband and wife, that they would levy a fine. Frequently such fine was requisite only on account of a title of dower in the wife; and no fine was levied, and the death of the wife has rendered it immaterial. But unless the real state of the title appeared, there would be a difficulty in the title, from an apprehension that the lands were the estate of the wife, and that the title may be open to a claim by her heirs; while if the seisin appeared to have been in the husband, the death of the wife, and the determination of her title of dower, might be proved, or would be presumed, and no difficulty would exist.

Another case frequently occurs, and deserves attention.

The abstract commences with a deed, dated above sixty years ago; being a conveyance from husband and wife of lands of which they were seised in right of the wife; and there was a covenant that they should levy a fine; but on

the most diligent search no fine by them can be found.

A title thus circumstanced is frequently accepted on the ground, that as sixty years have elapsed, no writ of right could be maintained by the wife if living, (an event not in any degree probable,) or by her heirs. And in this place it may be observed, that thirty years would bar the wife herself of her writ of right; and that sixty years are never allowed to any person, except the right is *auncestrel*, that is, first accrued to an ancestor, and descended from him to an heir; and that a bar to the ancestor, because thirty years ran in his time, is a bar to the heir claiming in right of the ancestor; at least there would be an absurdity in the statute of limitations, unless this be its true interpretation. On this subject a more ample discussion will be given in a subsequent part of this work.

But a title of this description is attended with one difficulty. Although there may be a bar to the remedy by writ of right, it does not follow that there is a bar to the remedy by entry, or by writ of entry.

In the first place, in reference to the right of entry, there is not any adverse possession against the wife during the coverture. For want of a fine from the husband and wife, the alienation is, in substance, by the husband alone; so that till the determination of the coverture, by the death of the husband or of the wife, the posses-

sion under the conveyance, is under a title proceeding from the husband ; and if the husband was or became entitled to be tenant by the curtesy of England, then the possession under the conveyance is by title, until the death of the husband, although the wife may die in his life-time.

Thus 20, 30, 40, 50, or even 80 years, may elapse, and the possession be rightful, because the husband lived so long. He may sell at 21, and die at the advanced age of 80, 90, or 100 years or upwards.

The right of possession, unless barred by nonclaim under a fine, may continue for twenty years ; and if the person to whom the right first accrued should be under any disability, the bar may be protracted for an enlarged period, (being ten years) from the time at which the disabilities shall cease.

These observations are added in this place, to show that a title thus circumstanced is not necessarily good, though sixty years have elapsed. For that reason the state of the title under adverse possession, should be investigated, before a purchaser, requiring a secure title, should be advised to complete his purchase.

Also reputation that a title is bad, or an assertion of right by one of the family of a former owner, or the like circumstance, is a ground for the most minute investigation, and for having every link in the chain of evidence complete ; for it seldom happens that such reputation arises,

or such claim is asserted, without some cause, except in the instances which are noticed, as depending on vulgar errors respecting heir-land.

Conveyancers are frequently censured for making inquiries, which appear unnecessary, and even frivolous, and which often fail of producing any beneficial result, or useful information ; and beyond all doubt, the expense which attends these inquiries does, in the aggregate, greatly exceed the value of the information which is obtained. But experience dictates the necessity of these inquiries, and the individual, whose interest is at stake in the particular transaction, is, in point of security, abundantly compensated for the expense which is incurred ; and if the seller has been so unfortunate, that the necessary inquiries were not made on his part, when the purchase under which his title commenced took place, he has to blame the want of caution in those who were bound to watch over his interest.

The purchaser also must consider, that unless those inquiries are made on the present occasion, they will probably be made on his sale, or on his mortgage, should any take place ; and he will not only sustain the expense and delay of ascertaining the facts, but may have an objection taken to his title ; and in the mean time be exposed to the danger that the title may turn out bad, defective, or encumbered ; and may be fettered with great difficulties, from the delay

which may arise in completing the sale, or in obtaining money on a mortgage, at a time when it is of the greatest importance to him to receive the purchase or mortgage-money.

Property in land, without the means of carrying it to market for the purposes of sale, or mortgage, is frequently a snare, rather than a benefit to the owner. He enters into engagements, or pledges his credit, or contracts debts, on the faith, that he can convert his land into money whenever he pleases; and the difficulties, and even ruin, to which families are exposed, by the discovery of a defect in a title, and the consequent inability to complete sales, or to effect mortgages; and even the doubts on titles, which render a suit in equity, and consequently some delay necessary, cannot be appreciated by any persons except those who have had experience on these points.

In short, any person who buys an estate, (except it consists of a small quantity of land merely for convenience,) and especially those who buy an estate for residence, or with a view to building, or other costly expenditure, should be particularly careful, that the title is not only apparently good, but such as in the technical language of the courts is *marketable*, so that he may compel an unwilling purchaser to accept the same; and may also exhibit the title in a state which shall exclude all just grounds for any doubt of its validity.

One of the great uses of property in land is

to afford, not only permanent security in enjoyment, but the right to convert it into money, or to raise money on its security, as occasion shall require. To the merchant or trader in particular this is of the highest importance; and, in every situation of life, the advantage of having a good title, so as to raise money without difficulty or delay, either by sale or by mortgage, at pleasure, will be sensibly felt.

Even persons contracting for a lease may now investigate the title of the intended lessor, unless there be a stipulation to exclude such right.

An estate without a marketable title, though that title be good for the purposes of enjoyment, partakes of the nature of an income rather than of property; and in the hands of the greater part of mankind is comparatively of little value.

Even when an estate is purchased with a view to convenience, either for the purpose of rendering an estate compact, by buying intermixed grounds; or for extending the family estate; every necessary care, which the circumstances will admit, should be taken, to have the best title and evidence of it, that, in the nature of the case, can be procured.

The want of such caution, and still more the want of attention, in preparing the particulars of sale, has more than once been the cause of a contract being rescinded, because the title to that part of the estate which, at the time of the

purchase, was particularly eligible for its convenience; as a piece of ground in the front of house, or in the garden, or the pleasure grounds; was defective.

A material distinction, however, may be safely made in regard to lands professedly purchased with a view to sale, or with the expectation of raising money by mortgage, or for personal occupation, with an intention that the lands shall be converted into money on the death of the purchaser on the one hand, and lands which on the other hand are purchased for the convenience of the purchaser, either for trade, or for rendering the estate compact, &c. without regard to remote consequences.

In the latter instance it may be sufficient that the result of every reasonable inquiry should prove that there is a fair chance of the title being good, and of peaceable enjoyment.

This, however, must depend on the discretion of the purchaser. In the former instances, it is of the utmost importance that there should be evidence of a good title; and that the title should be such as is strictly marketable.

These observations may be considered as forming part of that arrangement of this essay, in which conclusions are to be drawn, from the abstract, on the state of the title; and in short, it is rather with a view to this conclusion, and as a primary object of it, that attention is in this place, to be paid to the evidence of the commencement of the title.



In those instances, in which it appears on a first view that the evidence is taken up at too modern a period, the best course is at once to return the abstract for the purpose of having the earlier evidence of title supplied.

Before this head shall be closed, it will be proper to observe that *lay corporations* are as competent to alien their landed property for corporate purposes, as individuals are to alien their property. But it rarely happens that they can show the commencement of their titles; and leases and rentals are the only evidence of their seisin; and this evidence must be deemed satisfactory; and the title may be treated as good under such evidence, unless there be notice that the corporation, as frequently happens, hold the land subject to some trust, and they are not by the trust, or by some act of parliament obtained for the purpose, qualified to make a good title to the exclusion of the trust.

There is one peculiarity attending corporations. They have a fee simple for the purposes of alienation, although they have only a determinable fee for the purposes of enjoyment. On the dissolution of a corporation, the reverter will be to the original grantor, or his heirs, and not to the lord by escheat; and yet this grantor, in the case of a corporation, as well as the lord by escheat, in the case of an individual, may be excluded by an alienation in fee simple.

By a grant to a bastard, or a denizen in fee, he has a fee simple, for all the purposes of

alienation, although there be a right of succession to a limited series of heirs, since none besides descendants can be his heirs.

Though the succession is by law thus restricted, he is tenant in fee-simple, and not tenant in tail. On the failure of his heirs there will be an escheat to the lord of the fee, and not a reverter to the grantor, or his heirs; while on the dissolution of a corporation, and consequent failure of successors, the lands will revert to the grantors, or their heirs. But there is this similarity in the situation of a corporation on the one hand, and of a bastard or denizen on the other hand; either may alien the fee-simple; but there is also this difference; the grantor to the corporation, and his heirs, will have lost all right and chance of reverter, while in the case of a bastard or a denizen, the lord of the seignory will have the chance of escheat on the failure of the inheritable blood of the tenant for the time being of the fee-simple, whoever that tenant may be.

Cases frequently occur of corporations being dissolved, or ceasing to exist, and of a new incorporation.

This new incorporation, unless it be by act of parliament, cannot, except as against the crown, nor as against the crown, unless there be a special and express grant for the purpose, revive in the new corporation a title to the lands which belonged to the old corporation.

Consequently a title asserted by the new corporation, to lands which belonged to the old corporation, must be minutely considered, and the chance of eviction be weighed.

But the same corporation may have continuance, although there be a change in its name, or in some parts of its constitution; and it follows, that the title of the corporation to its lands will continue.

On the commencement of abstracts, as they apply to terms of years, and other minor points, the leading observations proper to direct the attention of the conveyancer, will be found in the division which treats of the form of the abstract.

#### *Of the Contents and Progress of the Abstract.*

THE abstract of each deed or instrument should in the first place be read.

It should next be ascertained, that the deed has the circumstances which give to its language the effect which that language imports to bear; namely, that it is executed by the material parties, and if any particular mode of execution was required, then, as far as that mode of execution is material, that it was observed. For unless the deed be executed by the persons whose language it imports to express, it is, as far as respects the persons who have omitted to execute the deed, to be considered at law,

whatever equity may arise from particular circumstances, as a dead letter.

For instance, if a deed import to be the grant of *A* and of *B*, and it is executed by *B* only, it must be read and considered as the deed of *B*; and as not having any operation whatever against *A*; so that the title must be carried on under this conveyance, as a conveyance by *B* alone. This is also a rule as to the declaration of the uses of fines, &c.

And in regard to deeds delivered as *escrows*, to be delivered with effect upon conditions to be performed, care should be taken that the conditions have been performed, and that the second delivery has taken place; so that the writing has become operative as a deed.

On this subject, when necessary, the title, *faits, escrow, &c.* are the proper heads to be consulted.

The learning of *escrows* was fully considered in *Jennings v. Bragge*, cited 3 Rep. 35, and *Periman's case*, 5 Rep. 84, and is collected in *Shep. Touch.* p. 56, 57. It is a learning which might with great propriety and convenience be applied in practice more frequently than has in modern times been usual. The knowledge that relief may be obtained in equity, when the conveyance has been executed, but the price has not been paid, or when any other stipulation has not been performed, has rendered professional gentlemen less solicitous than they otherwise

would be in allowing deeds to become perfect, while the purchase-money, &c. remains unpaid, or other stipulation remains unperformed.

Also, care should be taken that every deed purporting to be executed by a party, is duly attested as to its execution.

This is particularly important in modern deeds ; and the want of such attestation ought to be considered as rendering it necessary, that there should be a new attestation by the witnesses, if living ; and if they be dead, there should be a further conveyance from the parties, as to whom there is not any attestation, or there is not a sufficient attestation ; or by those who represent them.

But as to ancient deeds, in which the possession has been held, according to the purport of the deed, so that, in the language of the present day, the deed proves itself, or more correctly speaking, possession, according to the import of the deed, is evidence of the due execution of the deed ; then the want of such attestation does not raise any objection to the evidence of the title. The execution would be presumed on the evidence of possession.

Also, in deeds made in pursuance and in exercise of a power, and which, by the terms of the power must be executed in some particular mode, or attested by a given number of witnesses, care should be taken that the ceremonies of execution and of attestation were observed.

In this instance the language of the power

is to be considered as a law, which the parties have prescribed to themselves, and as excluding the application of the general rules of law.

When a deed is required to be under hand and seal, it is not sufficient that it should be sealed and delivered, as in ordinary cases, but it is requisite that it should be signed by, or in other words be under the hand of, the party.

This also is the case when the deed, &c. is required to be signed, sealed, and delivered; it must be signed; also sealed; also delivered.

And although, by the rules of the common law it is not of the essence of a deed that there should be any subscribing witnesses, and in all ordinary cases of deeds one subscribing witness is sufficient, yet, when a power requires that the execution should be attested by two or more witnesses, there must be an attestation by that number; and if they are required to be of a given description, as *peers*, or not to be of a given description, as *menial servants*, these requisites must be complied with, and the fact should be in some mode ascertained, if the transaction be of a recent date.

In this place also, it may be observed, that it is not sufficient, that the deed itself should internally, and by its own language, express the mode of execution, or the mode of attestation.

These circumstances of execution and attestation, must appear as substantive and external

facts ; and the attestation, and not the deed, must evidence the necessary facts.

The attestation must also specify the facts required to be attested, namely, signing, sealing, or delivery, or all or any two of these facts that the power requires.

Though the ordinary form of attestation merely contains the words, sealed and delivered by, &c. ; yet, when a power requires that a deed, made in exercise of a power, should be under hand and seal, or be signed, sealed, and delivered, and be attested by two, or any other given number of witnesses, and the attestation is, in construction, to be applied to the signature, &c. ; the deed cannot be considered as duly attested, unless the attestation express the fact that it was signed, as well as sealed and delivered ; and many titles depending on powers were open to objection in consequence of this omission.

Before this question was decided, some conceived that the fact of signature might be supplied in the attestation by the witnesses at any time ; and the general opinion now is, that this might be done in the life-time of the appointer and appointee ; and before any circumstance has taken place by which a change has been made in the circumstances of the title ; for instance, before the power has been released, determined, extinguished, or the like.

For the power is to be considered as not

executed till the moment when the attestation is complete. *Hawkins and Kemp*, 3 East 410, appears to be an authority to warrant this conclusion.

Some powers merely require the instrument exercising the power to be under hand and seal, or signed, sealed, and delivered, without making attestation an essential ceremony in the execution of the power.

In a case of this description, the want of attestation is no otherwise material than the want of attestation of any ordinary deed; but the fact of due execution, when the deed is signed, &c. may be presumed, as in ordinary cases, from long possession, consistent with the deed.

It is to a case of this description that Lord Eldon's observations in *M<sup>c</sup>Queen v. Farquhar*, 11 Ves. jun. 467, was applied.

This was admitted by his lordship in the case of *Wright v. Wakeford*, 17 Ves. 454. The observation towards the conclusion of the judgment in *M<sup>c</sup>Queen v. Farquhar* was too general and incorrect. The chancellor has himself made this criticism on the report. The passage must be read as applicable to the particular case before the court; a case in which attestation was not an essential circumstance to the valid execution of the power, consequently it is not to be applied to those cases in which attestation is necessary to the valid execution of the power. The opinion of Lord Eldon, as collected in the more recent case of *Wright*



v. *Wakeford*, was, that the want of attestation to a deed, made in exercise of a power, requiring to be attested, could not be supplied by any intendment contrary to the evidence of the deed, by which it appeared that no attestation of the fact of signature had been made on the deed in the life-time of *all* the parties. The fact in that case was, that *after the death* of one of the parties, and after the title had been questioned for want of due attestation, the subscribing witnesses to the deed added a new attestation of the facts of signing, sealing, and delivery. Lord *Eldon's* opinion evidently was, that this was not sufficient; and he even hinted, that the attestation must be a cotemporaneous act; a proposition which is very questionable.

It is necessary, however, to add, that the three puisne judges of the common pleas certified to the same effect. Their language is, "And we are further of opinion, that the attestation required to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing the writing, testifying the assent and approbation of *Thomas Wood* and his son; such being the usual and common way of attesting the execution of all instruments requiring attestation, which, we think, the parties creating the power had in their contemplation, and intended, and not an attestation to be written at a distance of time, after all the parties had

testified their assent and approbation." While, in *Doe v. Beach*, 2 Maule and Selw. 582, lord *Ellenborough* observed, "It is not necessary to enter into the question, at what precise time an attestation must be made."

The point arising in *Wright v. Wakeford* was referred to the court of common pleas, and was in that court treated as a point of no difficulty; and the judges were at first disposed to view the objection to the title as altogether unfounded. After some consideration they began to doubt: In the result, Chief Justice *Mansfield* certified his opinion in favour of the execution of the power; and the remaining three judges certified their opinion to be, that the power was not duly executed, 4 Taunton 213.

The chancellor by his decision sustained the objection against the title.

This decision, and the alarm which it excited in consequence of various titles exposed to the like objection, and the wishes of the profession, led the writer of this essay to propose a bill in parliament, intituled, "An Act to amend the law respecting the attestation of instruments of appointment and revocation, made in exercise of certain powers in deeds, wills, and other instruments;" and after various alterations, it passed into a law, 30th July 1814, being an act of 54 Geo. III. c. 168.

The act recites, that "Whereas powers, authorities, and trusts, were in many cases required to be executed by deeds or instru-

“ ments, signed by or under the hands of the  
“ persons executing the same, or that persons  
“ consenting to or directing acts respecting  
“ such powers, authorities, and trusts, are fre-  
“ quently required to signify such consent or  
“ direction, by deeds or instruments signed by  
“ them, or under their hands ; and that it had  
“ been the ordinary practice, in the memoran-  
“ dum of attestation of deeds, to express the  
“ facts of sealing and delivery only ; and that  
“ doubts had arisen respecting the validity of  
“ deeds or instruments so attested, and requir-  
“ ing signature, although the same might have  
“ been actually signed by the persons whose  
“ signature was required thereto, and the titles  
“ of many purchasers, and of other persons  
“ claiming under such instruments, might be  
“ defective for want of the insertion of the  
“ word ‘ signed,’ or some word to that effect,  
“ in the memorandum of attestation thereof ;  
“ and that it was expedient that the titles of  
“ purchasers and other persons should not be  
“ disturbed merely on account of the omission  
“ to express the fact of signature, in the me-  
“ morandum of attestation of any such deed  
“ or other instrument already made.”

And it was enacted, *first*, that every deed, or other instrument *already made*, with the intention to exercise any power, authority or trust, or to signify the consent or direction of any person whose consent or direction might be necessary to be so signified, should, (if duly

signed and executed, and, in other respects, duly attested,) be, from the date of that act, and so as to establish derivative titles, if any, of the same validity and effect, and no other, at law and in equity, and proveable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness or witnesses thereto; and the attestation of the witness or witnesses thereto, expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing, or any other form of attestation, shall not exclude the proof or the presumption of signature.

2dly, That the act should extend and be construed to extend to all deeds, and other instruments, *already made*, in exercise of powers, authorities, and trusts of sale, exchange, partition, selection, nomination, discretion, leasing, jointuring, raising portions, and other charges, and for appointing new trustees, and other powers, authorities and trusts whatsoever; or made for evidencing assent, consent, request, direction, or any other like circumstance, in reference to the execution of any such powers, authorities or trusts: with a proviso, being § 3, that this act should not extend nor be construed to extend to revive or give effect to any appointment, revocation, or other assurance theretofore made, as far as the same had been avoided by entry or claim, or by suit at law, or in equity, or by any other legal or equitable

means whatsoever ; nor should the act affect or prejudice any suit at law or in equity then depending, for avoiding any deed or other instrument of appointment, revocation, or assurance ; and that if any person who had made any such entry or claim, or who had brought any such suit, or had defended any suit for the purpose of avoiding any such appointment, revocation, or other assurance, should release the benefit of the same entry, claim, suit or defence, within six calendar months next after the passing of that act, then such entry, or claim, or suit, or defence, should not prejudice or avoid any such appointment, revocation, or other assurance ; but every such appointment, revocation, or other assurance, should be and remain in force under that act, as if no such entry or claim had been made, or suit brought or defended : with a further proviso, being § 5, that nothing in that act contained should extend or be construed to extend to affect any question respecting any instrument not within the provisions of that act, and which might want any formality in the attestation of any witness or witnesses thereto ; but such instrument should have the same force and effect as it might have had if that act had not been made.

It will be observed, 1st, that this act cures no other defect than the want of attestation of signature :

And 2dly, it is retrospective only, and not in any degree prospective ; thus it has not cured

any defect arising from the want of signature, or the want of attestation of any other fact than signing, as the want of attestation of sealing, or of delivering ; nor is it applicable to any deed, or other instrument of a date subsequent to the 30th day of July 1814, being the day from which the act had its operation.

So that the decision in *Wright v. Wakeford* is the law of the present day, as applicable to all deeds, &c. executed under powers which required attestation of signature, and have been executed even by signature, but have omitted a specification of the fact of signature in the attestation.

The case of *Wright v. Wakeford* has been followed by the cases of *Doe d. Mansfield v. Peach*, 2 Maule and Selwyn 276. *Doe d. Hotchkiss v. Pope*, 2 Marshall 102.

In all these cases the decision has been uniform, that the attestation must express the fact, be it signing, sealing, or delivery, which is required to be attested.

It seems also to follow that the attestation must also specify by whom the deed, &c. made in exercise of such a power, is signed, sealed, or delivered ; since without such specification it would be necessary, contrary to the intention of the author of the power, to resort to extrinsic evidence, to supply the evidence of that fact.

Titles of this description also admit of many different varieties of circumstances, and consequently conclusions.

1st, When attestation is not required, the fact of signature may be proved by the witnesses, or it may be proved *aliunde* ; also, after a great length of time has elapsed, and if the deed appear to have been signed, the presumption of signature may be relied on, since a jury would consider the signature as having taken place at the time of sealing and delivering.

2dly, In many instances also, even where attestation is required by the power, the deeds may be good in equity, on the ground of *contract*, and of the price paid, although the deeds may be inoperative at law ; but when a married woman attempts to execute a power, requiring attestation, and no attestation exists, doubts may be entertained whether there be any equity in favour even of a purchaser ; since it is difficult to understand how a married woman may be bound, even in equity, by any contract which is deficient in those circumstances by which her power of contracting is created ; for she is, even in equity, considered as a *feme sole*, or person able to contract, so far only as she is qualified by her power, and she pursues the power.

In other cases, the deeds made in the execution of the power may be lost, and then the general rules of presumption, and particularly the rule, *omnia præsumuntur, ritè and solemniter acta*, will, in cases of possession consistent with the deed, equally apply to deeds prepared under powers as to ordinary deeds ; and a jury would, in the absence of all evidence, be

directed to presume, that the deed of appointment, of which secondary evidence is given was duly attested, as well as sealed and delivered.

One of the many objections against a reliance on abstracts, which take recitals for the evidence of deeds, wills, &c. is, that the external circumstances of execution and attestation seldom or ever appear by recitals; and of course it is not certain that the deed or will was duly executed and attested; or, even though the facts should be recited, they are seldom recited in any other manner than as the language of the deed, while the more correct mode would be; and this mode is now becoming general in practice; to give the recital of the execution and attestation as a substantive fact, alleged from the evidence of the transaction, when the recital is of a deed made in execution of a power.

Such recital may be to this or the like effect: *Whereas, by indenture, &c. bearing date, &c. made, &c. and being under the hand and seal of, &c. and signed, sealed, and delivered by him, in the presence of two witnesses, and attested by the same witnesses.*

Also when a deed requires *enrolment*, either by positive statute law, or by the provision of a power, it is the duty of the conveyancer to see, or at least to inquire, whether the deed has been so enrolled, and whether the enrolment was



made in due time, if time be material in reference to the enrolment.

Respecting the period within which enrolment is to be made, the following observations may be of use ;

1st, A bargain and sale of an use, under the statute of uses, 27 H. 8. c. 10, must, in conformity with the statute of enrolment, 27 H. 8 c. 16, be enrolled within six lunar months from the date ; and the date is computed from, in other words, exclusive of, the day of the date, and inclusive of the last day of the six months. So that the indenture of bargain and sale must be enrolled on or before the 168th day after the day of the date of that indenture.

By the date must, in this case, be understood the day of the date, and not of the delivery, except a deed has no date ; and in that case the computation must be from the delivery : and although the day of the date of the deed be not taken into the computation of the six months, an enrolment on the day of the date will be good ; and such bargain and sale will be valid, although the enrolment take place after the death of both or either of the parties, provided the indenture be enrolled within the limited time ; and no act done by the bargainor without the concurrence of the bargainee, in the intermediate time between the bargain and sale and the enrolment, will affect or prejudice the interest of the bargainee, so as the deed be enrolled in due time.

2dly, Bargains and sales of real estate, under the bankrupt laws, must be enrolled ; but as to any other estate or interest of the bankrupt, besides an estate tail, there is not any limited time for the enrolment. It is immaterial whether the ordinary bargain and sale be enrolled before or after the expiration of six months, or in the life-time of the bankrupt, or after his death : but it should seem, that in compliance with the general principles of law, it must be enrolled in the life-time of the bargainees, or of one of them.

Under bargains and sale from commissioners of bankrupt, no estate passes till enrolment. The commissioners have only an authority to bargain and sell by deed indented and enrolled. No estate is in them ; and their authority is not exercised till all the circumstances, under which it is to be performed, are complete.

But by the statute of 21 Ja. I. c. 19, s. 12, bargains and sales of real estate of a bankrupt, of which he is tenant in tail, must, for the purpose of barring the heirs in tail, and those in remainder and reversion, be enrolled within six lunar months.

In this instance also no estate passes till the enrolment.

Suppose a bargain and sale, and the six months to elapse before enrolment, yet it is reasonable to suppose that another bargain and sale by the commissioners, and enrolled within six months, would be effectual to bar the entail.

This is a point open for decision. Should the bankrupt be dead, then it might reasonably be objected that the authority of the commissioners to execute a bargain and sale to bar entails had ceased.

The observations respecting enrolment in the life-time of the grantee, are applicable to bargains and sales under various other acts of parliament; as the land-tax acts, inclosure acts, &c., in which enrolment is required, as an essential part of the deed by which a power, or rather an authority, is to be exercised.

And when an enrolment is required to be made within a *limited* time, the deed will, at least as to its legal, as distinguished from its equitable, operation, be void, unless the enrolment take place within that time.

Also, when a deed is required to be enrolled under the express provision of a power, in a private conveyance, the deed must be enrolled in the mode prescribed by the power, viz. within a given time, if a particular time be limited; and in a particular court, if any court be prescribed.

And if a time be limited within which the enrolment shall be made, the enrolment must take place within that time, or be of no avail; and if no time be limited for the enrolment, the law requires the enrolment to be in the life-time of the parties; and, it is apprehended, of the appointees as well as of the appointer. See *Hawkins v. Kemp*, 3 East 410.

From the preceding observations it will be collected that different circumstances impose a different regulation in this particular.

The case of *Hawkins v. Kemp* is sometimes considered as turning on the point, that the act of enrolment was in some measure a *personal* act, to be done by Mr. Hawkins, so far, that it was necessary to take place in his life-time, and did not admit of perfection after his death.

But it should seem that if the power allow a limited time for the enrolment, the appointment will be sufficient, if the deed be enrolled within that time, notwithstanding the death of the appointer or appointee in the interval between the date of the deed and the enrolment.

This was the more prevailing opinion in *Hawkins v. Kemp*.

It is observable also, that in appointments under powers, except in particular cases, arising from the special language of the power, no estate arises till enrolment. *Hawkins v. Kemp*. *Digge's case*, 1 Rep. 123.

And the appointment may be defeated by an act done by the owner of the power, by which he has extinguished the same, while *in fieri*. *Digge's case*.

Also when *livery of seisin* is essential to the conveyance, as in the instances of feoffments, leases, or other grants at the common law, of estates of freehold, of lands held in possession, (for leases for lives in exercise of powers may be, indeed ought to be, made

without livery,) it is necessary to see that livery was made in the life-time of the feoffor and of the feoffee, or of the lessor and of the lessee, 1 Inst.

And when livery is made, as it may be by attorney, then care is to be taken that the attorney had an authority for the purpose, and that such authority was created by deed, and that it has been duly pursued.

If livery be made by the feoffor, or to the feoffee in person, it must, *ex vi termini*, be in the life of the person making, or of the person receiving, livery. The cases which suggest inquiry are those in which livery is made or accepted by attorney, or by or to the *heir* as such.

Many nice distinctions arise between livery in person, and livery by attorney; and the general learning of livery of seisin should be studied under the doctrine of feoffments.

But in regard to ancient deeds, under which the possession has been held, consistently with the deeds, for thirty or forty years, it is reasonable to presume that livery was made according to the deed, although there be not any direct evidence of the livery. A jury would most unquestionably presume the livery. 1 Vern. 195.

When livery is made or accepted by attorney, the instrument which created the authority ought to accompany the title deeds, or be within the power of the purchaser; and it is to be

shown that the feoffor was living at or after the time of livery by his attorney; so as to the feoffee, if he accepted livery by attorney. It should be seen that the letter of attorney was by *deed*, for this is essential, and that it contained language which authorized the act which has been done under the power assumed. As an exception to a general rule, an infant may appoint an attorney to receive livery of seisin for him, as feoffee. 1 Roll. Abr. 730, l. 10. *Palfreyman v. Grobie*.

It is also observable, that without express words in a power, the power cannot be executed through the medium of an attorney; thus an attorney cannot execute a lease under a power to lease; *Combe's case*, 9 Rep. 77; or give consent to a revocation of uses, although no discretion be confided to him, *Hawkins v. Kemp*, 3 East 410; nor surrender copyholds under an authority to executors to sell, 9 Rep. 776; or surrender copyholds on behalf of a married woman; still less, except under the provisions of the act of 47 Geo. III. sess. 2, c. 8, suffer a recovery on her behalf. In short, an attorney cannot be appointed to do an act which is *personal* to the person who assumes to give the authority.

Deeds to be executed by attorney should be in the name of the principal, (*Combe's case*, 9 Rep. 776,) and not of the attorney. They should be executed as the act and deed of the principal, either in form or in substance. The

signature should be with the name of the principal, rather than with the name of the attorney; but an inaccuracy in the latter particular would not vitiate the deed. The reason is obvious; signature is not of the essence of the deed.

While writing these observations, one of those frauds which occur in practice has been under consideration.

An attorney sold under an authority which conferred a power of leasing, not a power of sale. Several years elapsed before the defect was discovered, and many intermediate conveyances from purchaser to purchaser had taken place. At last the defect was discovered.

To give a colour to the title, a formal letter of attorney was prepared to the same person, though he had paid the debt of nature. It was dated prior to the conveyance which the attorney had executed, as if the date would give relation to the authority so as to effectuate the conveyance already made.

But the inaccuracy of the transaction was easily detected; first, by the stamp to the letter of attorney; and secondly, by the watermark on the paper, showing the year of its manufacture; and each of these circumstances afforded the means of impeaching the internal evidence of the deed.

It is by attempts of this nature that transactions in which similar fraud has not been practised, are scrutinized with a severity which is the only safeguard against fraud.

Were it not disgusting to detail such transactions, another fraud actually committed, and which at this moment is vexatious to a large body of purchasers residing in a village near the metropolis, might be stated as a defence, were any defence necessary, for the strict scrutiny with which titles are investigated.

Formerly an *attornment* was essential to the validity of some deeds, as grants of reversion, &c.; and no estate passed till attornment. The reason assigned by lord *Coke* is, "Every grant must take effect as to the substance thereof, in the life of both the grantor and the grantee," 1 Inst. 309 a. And he adds, "In this case, if the grantor dieth before attornment, the seignory, rent, reversion, or remainder, *descend to his heir*; and therefore after his decease the attornment cometh too late. So likewise if the grantee dieth before attornment, an attornment to the heir is void, for nothing descended to him; and if he should take, he should take it as a purchaser, where the heirs were added, but as words of limitation of the estate, and not to take as purchasers."

But unless the attornment was essential to the operation of the grant to pass the estate, and although there could not be any distress till attornment, (as in the instance of a fine, or bargain and sale by a conusee in a fine, before the conusee had obtained attornment) then the conveyance would remain in operation, notwith-



standing the death of the grantor or grantee before attornment, 1 Inst. 309 b. Even in the instance of a manor partly in demesne, and partly in services, and a feoffment of the manor, the services do not pass till attornment; so that the manor might have been destroyed by a severance of the demesnes from the services, by the death of the grantor or grantee before attornment. This had been a disputed point. 1 Inst. 310 b.

The necessity of attornment is now superseded by the statute of 4 and 5 Anne, c. 16, for the amendment of the law.

And as often as any difficulty arises from the absence of direct evidence of livery of seisin, the attention should be directed to consider whether the deed might not have operated as a grant of the reversion or remainder, expectant on a term for years, or some other particular estate. Even an estate at will by copyhold tenure will be sufficient to lay a foundation for a deed of grant, as an efficient conveyance at the common law; and it is obvious, that when there are a lease and release, as parts of the same assurance; or when the grantee has an estate capable of enlargement, as in the case of every particular tenant, even of a tenant at will, a copyholder; or a person holding the possession as a mortgagor, by the permission of the mortgagee; or as tenant at will, to him, the want of evidence of livery of seisin does not afford a solid ground of objection.

against a title, provided the facts admit of proof, or the circumstances of the case afford a presumption supplying the place of proof. Thus, by reason of farm or occupation leases, or of outstanding attendant terms, few titles are defective for want of evidence of livery of seisin, or enrolment of a bargain and sale, or a lease for a year, as part of the assurance by lease and release.

On a late occasion, a very valuable estate in the neighbourhood of the metropolis was protected from eviction by resorting to the learning of grants. In that case, the issue in tail claimed the inheritance, on the ground that a recovery was defective for want of a good tenant to the writ of entry. The tenant to the writ of entry had been made by a deed intended to have been enrolled, and to have operated as a bargain and sale, under the statutes of Hen. VIII.; but by some strange neglect, no enrolment had taken place; and the title was supported by resort to an outstanding term for years, and to the estates or interests of copyholders, as the means of enabling the deed to operate as a grant of the remainder or reversion dependant on a particular estate.

Many useful observations on this point will be found in the chapter on lease and release in the second volume of the practice of conveyancing.

In some cases, an *entry* is necessary to complete the title, as in the cases of *exchange* at

the common law, of lands in possession to give an actual seisin, &c.; to convert an *intéresse termini* into an actual term ; and sometimes to revest an estate, or to restore the seisin, as in the case of an entry made after a disseisin, &c. or a condition broken ; and whenever the fact of entry is material to the title, there should either be direct evidence of it, or it should appear to be capable of some proof, to be within the power of the purchaser ; or the circumstances of the title should be such as afford an irresistible presumption that an entry was made.

It is to be remembered, that a bargain and sale for years gives an estate immediately on the execution of the deed ; while a demise at the common law of lands in possession requires an entry to gain a term separated from the inheritance.

Important consequences used to arise from this distinction. In modern practice, it generally happens that the deed can be used as a bargain and sale for years.

When the deed appears deficient in any of these circumstances, it becomes material to consider whether it cannot operate in some other mode ; for instance, whether it may not operate as a covenant to stand seised to uses, though it cannot have the effect of a feoffment ; or grant, or bargain and sale ; whether it may not operate as a grant in fee, though it is void as a bargain and sale in fee, or as a feoffment ; also, whether it may not operate under the

ownership, though it cannot be supported as an exercise of a power; and whether it may not operate as a bargain and sale for years, though it was inoperative, at least for a time, and in point of estate, as a demise at the common law.

By giving this application to the evidence of the title, a difficulty which otherwise would have existed will frequently be obviated. On this subject, the case of *Roe v. Trimmer*; 2 Wilson 75; Willes 682; *Shep. Touch.* p. 80, deserve to be consulted.

Also in modern deeds, if a pecuniary or other consideration be the motive for the deed, care should be taken that the receipt has been signed for this consideration.

The acknowledgment of the receipt in the body of the deed, except in the instance of the acknowledgment *by recital*, that the money was paid at some former period, will not be deemed sufficient. In equity, the receipt indorsed on the deed is considered, as has already been observed, to be the material evidence of the application of the money; and the want of such a receipt is implied notice that the purchase-money has not been paid; and in deeds which are questionable on the ground of fraud, the party will be required to prove the actual payment of the consideration. Hence it is, in practice, of advantage to make the payments, as far as circumstances will admit, through the intervention of bankers, since their books will afford evidence of the transaction.

Trustees in particular should make all their payments, and accomplish their receipts through the direct agency of bankers.

Although a bargain and sale of an use cannot be made without a consideration of money, or money's worth, as its foundation, yet on the other hand the payment of a pecuniary consideration may be averred and proved, although it be not expressed in the deed. On the other hand, if the consideration be expressed in the deed, then, for this purpose, the fact of payment cannot be controverted. The internal evidence of the deed is conclusive that there was a pecuniary consideration to support the deed as a bargain and sale.

The case of the *churchwardens of St. Saviour*, &c. 10 Rep. 67 b. treated this point as clearly settled.

But these authorities do not deny the necessity of proving the payment, in order to rebut the equity of a vendor; or when it is necessary to support the deed against an imputation of fraud.

Also in deeds made in pursuance of powers which require that other lands of equal or greater value should be settled, &c. as a condition, either in law or in equity, precedent to the execution of the power, care should be taken to see that the settlement required by the power has been made; and in some cases it will be necessary to go farther, and ascertain the value of the lands; and also, to investigate

the title to the lands which have been settled or given in exchange.

The observations respecting the application of the purchase-money suppose that no provision has been made to dispense with the necessity of attention to these particulars; or that the lapse of time, or acquiescence by all persons who were beneficially interested, has not superseded the necessity of inquiring into these points.

Provisions to dispense with inquiry into the fact of application of the purchase-money, are attended with great convenience, and are found in most well-prepared instruments.

Also in common law exchanges, in which the object is to have the identical lands, it is an incumbent duty to investigate the title to the lands which are purchased, and also to the lands given in exchange; since a defect of title to either class of parcels, or to any part of the lands of either class, will expose the purchaser to the danger of eviction.

Also, in titles which were formerly of copyhold tenure, and which have been converted into freehold tenure by enfranchisement, it is usual to investigate the title under the copyhold tenure, and also the title of the lord under the freehold tenure; since a defect in the title under the copyhold tenure would not, as against a stranger, be cured by enfranchisement.

Where the copyhold tenure is extinguished

in the freehold tenure, there is, as principle would suggest, an acceleration of the right of enjoyment under the freehold tenure; in the same manner as when a term of years merges in the freehold or inheritance; and the encumbrances on the freehold or inheritance take effect in possession.

A contrary doctrine has been advanced; and there is, it is believed, a decision to that effect, though frequent research has not discovered the case; but the principle on which this doctrine is maintained is not easily discovered; for when the copyhold estate ceases, the estate under the freehold tenure must take effect in possession; and conveyancers have uniformly acted on such acceleration, and often guard against it by creating a term of years out of the copyhold tenure, prior to the enfranchisement, that the title to the possession may depend on that tenure.

Indeed, it is difficult to find any principle of law under which a person whose title to lands, formerly of copyhold tenure, depends on enfranchisement, could, after an extinguishment of the copyhold tenure, protect himself from charges affecting the freehold tenure.

There is not any analogy between this case and a release of services by a lord of the manor, or other seignory, to the person who is tenant under the freehold tenure.

The tenant of the freehold tenure has a

fee-simple ; while a copyholder, though he has a fee by custom, is, in respect of the freehold tenure, merely tenant at will.

So when the lord purchases the copyhold tenure, and that tenure becomes extinct by union with the freehold tenure, it is unquestionably necessary to investigate the title under the copyhold tenure, as well as under the freehold tenure ; but, in this instance, there is not the same danger that encumbrances affecting the copyhold tenure would be accelerated.

Also, when the tenant under the freehold tenure obtains a release of the services from the lord, and there is a rent ; in this instance the rent will be extinguished ; but as the encumbrances of the lord cannot affect more than the rent and services, the title of the lord is not deemed of importance, unless the services be of considerable value, to call for the production of evidence of the title of the lord. A sound discretion, setting a boundary to inquiries of this description, should be used.

However, when a title to freehold lands is released from a fee farm rent, or rent charge, of considerable amount, it would be extremely imprudent to forego the caution of ascertaining that the rent has been released by persons who were competent to release the same.

Every partition between coparceners implies a warranty corresponding with the warranty on an exchange. This point, duly considered, leads to the conclusion, that when a title depends on



a partition between coparceners, the title to all the lands comprised in the partition, as well as to the identical lands which are purchased, ought to be taken into consideration, but this is not generally done.

In this place also, it may be noticed, that if a fine or common recovery be levied in the courts of Westminster-hall, of lands of the tenure of *ancient demesne*, these lands become, while the fine or recovery remains in force, frank fee; and the title will be involved in considerable difficulties, until the lands are restored to the tenure of *ancient demesne*, or are discharged by the lord from the services to the court of *ancient demesne*, and are in point of title, as well as in point of fact, become of the tenure of frank fee; in other words, of socage tenure.

In cases of this description it is also expedient to investigate the title of the lord of the manor of *ancient demesne*, before reliance can be placed on a release which imports to have discharged the lands from the tenure of *ancient demesne*; for it is at least doubtful, whether the lord of the manor can make the lands frank fee in point of title for any longer period than his own estate; and if he cannot (and it should seem he cannot) then the abstract ought to show a title in the lord to discharge the lands from the tenure of *ancient demesne*.

These are the only observations which are particularly important to be noticed in regard

to the external parts of a deed, and the circumstances arising as incidentally connected with the subject.

The next object to be attended to is the *form and operation of the deed itself*.

*Of the Form and Operation of the Deed itself.*

UNDER this head, it will be necessary to consider the act intended to be done, whether that which the deed imports to do is regularly done in point of form; and whether the parties were competent to do the thing in point of estate, and in point of discretion, freedom from coverture, &c.

The line of conduct to be adopted is to consider the particular deed in the first place, *per se*, and in the second place, relatively to the title.

The first object is to attend to the form of the deed, and see

1st. That it is made in the mode proper to attain the end proposed; for instance, that if a feoffment be requisite, it assumes the form, or has the ceremonies, of a *feoffment*, and consequently, that livery of seisin is made.

2dly. That if it can not operate as a feoffment, it may operate as a lease and release, and consequently that there is a lease for a year on which the release is grounded; or, if it cannot operate either as a *feoffment*, or as a *lease and release*, that it may operate as a

*bargain and sale enrolled*, and consequently, that the deed is founded on a consideration of money, or money's worth; and that it has been enrolled in the proper court, and within the limited time; and that if it cannot operate in either of these modes, it may operate in some other mode, by construction of law, *as a covenant to stand seised to uses*, and consequently that it is founded in the whole, or in part, on the consideration of blood or marriage; or that it may operate as an *appointment*; and consequently that there was a power as its groundwork.

These observations apply to lands held for an estate in possession; but if an estate in reversion or remainder in lands be the subject of the deed, then it is to be considered whether the instrument can operate as a grant, and consequently as to estates in remainder or reversion, it is necessary to ascertain that there was a previous subsisting particular estate which conferred a right to the possession, so that there existed an estate in reversion or remainder, divided from, and expectant or depending on, an estate in possession.

Also, if the conveyance be made to uses, care should be taken to see that the conveyance was well made at the common law; and consequently that there was a seisin to supply the uses; and when the conveyance is to be supported only as a bargain and sale of the use, or a covenant to stand seised to uses, then the atten-

tion must be directed to see that the instrument might operate as a bargain and sale, or gift of the use, by force of the statute of uses, under the seisin of the former owner, without any conveyance by him; and, consequently, that in a bargain and sale there is a valuable consideration, and in a covenant to stand seised to uses, the consideration of blood or marriage existed.

Also that the conveyance is such as in its nature admitted of a declaration of uses.

The following distinctions will deserve attention in this place :

An use cannot arise out of an use, or in other words, an use declared of a seisin, which arose from an use executed by the statute of uses, will not be executed by that statute. For the statute executes those uses only which are in the first degree, and not uses in the second degree. The latter uses are mere trusts or beneficial interests, and confer equitable estates only.

The following examples will illustrate and show the application of these observations :

A bargain and sale to *A*, to be executed by the statute of uses, gives *A* an use. Therefore a bargain and sale to *A* and his heirs, to the use of *B* and his heirs, gives *B* merely an equitable estate; for, as the bargain and sale passes an use to *A*, this is the use in the first degree, and will be executed by the statute. The ulterior

use to *B* is an use in the second degree, and therefore a mere trust.

But a bargain and sale under an authority in a will, or under a power in acts of parliament, as the land-tax acts, &c. passes a common law seisin, and a bargain and sale thus made to *A* and his heirs, to the use of *B* and his heirs, passes a seisin to *A* and his heirs, and the use to *B* and his heirs will be executed by the statute. In this instance, this is the use in the first degree.

Also observe, that a conveyance to *A* and his heirs, to the use of *A* and his heirs, gives to *A* a seisin wholly by the rules of the common law; since *A* could not prior to the statute be a trustee merely and solely for himself.

As the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate, lord *Bacon*, in his *Reading on Uses*, (p. 63,) gives this rule, and observes, therefore, the statute ought to be expounded, that where the party seised to the use, and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law.

But under a conveyance to *A* in fee, to the use of *A* for life, remainder to *B* in fee; or to the use of *B* for life, remainder to the use of *A* in fee, the use in favor of *B*, and also the use in

favor of *A* for life, but not the use to *A* in fee, will be executed by the statute.

But under a conveyance to *A* in fee, to the use of *A* in fee, to the use of *B* in fee, *A* will be seised by the rules of the common law, because the express declaration of use in favor of *A* renders the use declared in favor of *B* repugnant; and for that reason the use to *B* is considered merely as a trust.

However, even when a conveyance is made to *A* in fee, to the use of *A* in fee; a clause may be introduced which will make the conveyance operate as to the uses, or at least some of them under the statute of uses; for instance, if a power be added, that another person may create a jointure, or make leases or sales, exchanges, &c. such powers will be good; and when they are exercised they will give estates, through the medium of the statute of uses. So if a limitation were introduced to give the grantor an estate for life, either absolutely, or on an event, this addition would render it necessary that the use to the grantor should arise under *the statute of uses*, *King v. Inhabitants of Easington*, 4 Term Rep. 177.

In all those instances in which the uses arise from the common law seisin of *A*, the uses are to be executed by the statute; and if they are consistent with the use declared to him in fee, he will retain the fee as part of his common law seisin. But when his fee is modified by, or subjected to, any power, or to any shifting or

springing use, then, on account of this new quality, not warranted by the rules of the common law, even the use limited to *A* in fee will be subject to the operation of the statute.

Also, an appointment under a power in and arising under a conveyance to uses, passes the use itself, and not the seisin; and therefore, under an appointment to *A* in fee, to the use of *B* in fee, or to the use of several persons for particular estates, the statute executes the use in *A*, and the ulterior uses are merely trusts, in other words, are uses on uses.

But shifting or substituted uses are not uses on uses, and do not fall within the scope of the observations which are applied to uses bearing that character; for these shifting or substituted uses are merely alternate uses, and not uses upon uses. For this reason, a conveyance to *A* in fee, to the use of *B* in fee; and if *C* should pay a given sum within a limited time, then to the use of *C* in fee, gives a common law seisin to *A* to the use of *B*; and this use will be executed in *B*, by the statute of uses, subject to the shifting use declared in favour of *C*; and if the money should be paid within the particular time, this use declared in favor of *C*, unless defeated in the mean time, will also be executed by the statute of uses, and will over-reach, and, in effect, determine the estate of *B*.

From a former observation it may be collected, that it is immaterial whether the use of substitution be in favor of the grantee of the

seisin, or of a stranger : In either case it may operate with effect. Also, suppose a conveyance to be made to *A* in fee, to the use of *A* in fee, with a proviso, that if *B* should pay a certain sum of money on a given day, then the land shall remain to the use of *B* in fee. On payment of this money, according to the language of the proviso, the statute of uses would be called into operation, and would vest the fee in *B*. For that reason, the use to *A* in fee would be executed under the learning of uses, as the only means by which the proviso could operate ; and from the first instant, the conveyance would be, in effect and construction of law, a conveyance to the use of *A* in fee, liable to be defeated by the shifting use in favor of *B* in fee.

Within the whole scope of that learning which is more particularly to be studied by the conveyancer, there is none more important to be known than that which concerns the doctrine of uses ; for there are many things which may be done through the medium of a conveyance to uses, or under the statute of uses, without a conveyance, which cannot be accomplished by a conveyance merely and simply at the common law ; and consequently, there are many occasions in which it is absolutely necessary to resort to the learning of uses in framing a conveyance, or for giving it effect.

As the general outline of this learning, and the principal distinctions, are collected in the



second volume of the *Practice of Conveyancing*, p. 473, and in this volume, p. 101, it would be mere repetition to add them in this place.

To return from this digression on uses. But perhaps the deed in question was not intended to operate as a conveyance, but merely as *a release of right*, or as *a confirmation of title*. or as a release from one joint-tenant, or coparcener to his companion in the tenancy; or, as a *release* of rent, or common, or of services, or other incoporeal hereditament; or *to create an estate*, as in the case of a lease, grant of annuity, &c. &c. or to determine a particular estate, as in the instance of a surrender; and under all and the like circumstances, the point to be considered is, whether the deed has produced the effect which was contemplated; for, although the instrument may assume the form of a conveyance, or of a release, yet if that form was an inadequate mode of giving effect to the intention, it is next to be considered, whether the deed may not have the effect of that intention by which it was dictated, by some construction of law under the rule, "*cum quod ago non valet ut ago, valeat quantum valere potest*;" or, as the rule is more fully expressed in *Sheppard's Touch.* chap. Exposition of Deeds, in these terms, "that the construction be such, " that the whole deed, and every part of it, " may take effect; and as much effect as may " be to that purpose for which it is made; so " as when the deed cannot take effect, accord-

“ing to the letter, it be construed so as it may take some effect or other.”

Under this rule, a feoffment, a release, a surrender, a bargain and sale, a grant, or a lease, or rather an instrument in either of these forms, may operate as a covenant to stand seised to uses; and a lease in the form of a common law demise, may operate as a bargain and sale for years under the statute of uses.

A lease and release, void as such, because they import to pass an estate of freehold to commence *in futuro*, may operate as a covenant to stand seised to uses.

And when a deed may operate in either of several modes; for instance, as a lease for a year, by the rules of the common law, or as a bargain and sale for years under the statute of uses, it is in the option of the party to use it in either mode as he thinks fit.

In forming an opinion of the mode of operation, and effect of a deed, attention must necessarily be paid to its constituent parts, and care must be taken that it has all essential circumstances, and that it is good in point of law to produce a given effect; and if the effect be different at law from what it ought to be in equity, then the title must be considered as complete, so far only as respects the legal estate; and the equitable or beneficial ownership as divided from the legal estate will require a distinct consideration.

Sometimes a deed, though defective in legal operation, may, by way of contract, confer a good title in equity.

In considering the form, combined with the effect, of a deed, the circumstances to which particular attention must be paid, are,

1st. That there is or are a grantor or grantors.

2dly. That the grantors were of ability to make the conveyance, in point of age, of discretion, and other personal qualifications; and also, in point of ownership or estate, that is, of title, and that they were competent to make the same by the deed, &c. under consideration.

3dly. That there is a grantee or grantees, and that the grantee or grantees was or were capable of receiving the benefit of the grant in the mode in which the grant is made.

4thly. That there are proper, or at least, effectual, words of grant.

5thly. That there is a subject to be granted, and that such subject is described with sufficient certainty, and that this certainty embraces the lands in question, or some of them, by an accurate, or at least, adequate, description.

6thly. That the estate is well limited in point of law, and by technical words; so that the limitation is not void for uncertainty, or as contravening the rules of law, by granting an estate of freehold to commence *in futuro*, or by granting an estate in remainder, without any

particular estate to support it ; or after a particular estate which necessarily must determine before the remainder can commence ; or by granting a contingent remainder, without any prior particular estate of freehold to support the same ; or by limiting the estate to arise on an event against law, as on committing murder.

7thly. That if the title concern a rent, such rent is well reserved, or was duly created ; that if uses are declared, there is a seisin to supply these uses ; or that they may arise from the seisin of a bargainer in a bargain and sale, or of a covenantor in a covenant, to stand seised to uses ; that these uses are warranted by the rules of law, and not too remote, as tending to a perpetuity ; and that such uses, as far as respects the legal estate, are not open to objection, as being uses upon an use ; and that if trusts are declared, there is an estate in trustees to support these trusts, or a contract, which, in equity, will be binding on the ownership of the beneficial proprietor of the estate.

These are the leading points to be considered. They branch themselves into a great variety of learning, and involve all the niceties of the law which will have occurred in the progress of that course of study which has been recommended. An attempt to give even a summary view of this learning will be attended with considerable difficulty. On the one hand, to go through the subject, fully, would be to write a comprehensive treatise on all the various learning on

real property; on the other hand, to give merely a summary view of the subject, will render it still necessary that the student should extend his researches into books which treat of the subject at large.

Still, however, it will be right to give a short intimation of the leading points which present themselves more immediately in practice under these different heads; and to refer to the books from which more full information may be obtained.

1st. That there must be a grantor, and that he must be able to do the act in point of estate, and of ownership, and also in point of discretion.

This leads to the consideration of the abilities of persons, and also the nature and extent of the ownership conferred by particular estates.

Respecting the ability of persons;

All persons are, in point of discretion, &c. able to grant, unless they are disqualified by the circumstances of infancy, lunacy, idiotcy, duress, coverture; and even some of these persons may grant in some mode, and to a certain extent, although they are incapable to grant in a different mode, or to a greater extent.

So as to estates; all owners of vested estates, except incapacitated by one of the disabilities which have been mentioned, may grant the whole of their ownership under that estate, or create any particular estate or interest out of

the same ; for *Cui licet quod magis non debet non licere quod minus* ; also, *cujus est dare, ejus est disponere* ; and tenants in tail may, by a particular mode of assurance, as by common recovery, bar the estates limited after and expectant on the estate tail, and enlarge their particular estate into a fee-simple.

Some owners of estates also are allowed the power of divesting the estates of other persons, so as to turn these estates into a right of entry, or into a right of action. And this right of entry, or of action, may be ultimately barred by the statutes of limitation, or by nonclaim on a fine, so as to give a good title in fee-simple. But in the mean time, till this bar is perfect, or the right is released, the title will be defective. Such alienations are wrongful, and operate by way of disseisin.

So also an estate vested in one person may, by disseisin, abatement, or intrusion, become vested or placed in the seisin of another person.

At first such title will be defeasible ; but eventually by release, bar by nonclaim on fine, or by one of the statutes of limitation, such estate may become indefeasible.

Also an estate may be defeasible by condition, but may become absolute, either by a performance of the condition, or by a release of the condition before it be broken, or of the right of entry, or of action after such right has accrued. Also an estate may be determinable, from the circumstance, that it is

derived out of a particular estate, for *cessante statu primitivo, cessat derivativus*; or defeasible, because it is founded on a defective title in the person by whom the particular estate was granted; and such defective or defeasible title may become complete and indefeasible by the release or confirmation of the person in whom the right resides.

The general and leading rule as to alienations and forfeitures is, *quod meum est sine facto meo vel defectu meo, amitti vel in alium transferre non potest*; on the other hand, in favor of alienation, the rule is, *nihil tam conveniens est naturali æquitati, quam voluntatem domini rem suam in alium transferri ratam habere*.

But in considering titles another rule must be carried in the memory, *quod semel (Anglicè already) meum est, amplius meum esse non potest*, 1 Inst. 49. Hence a demise of the fee to an heir does not make him a purchaser; and hence a conveyance to a person who already is the owner, must operate as a release of right, or a confirmation. It may improve, but cannot change, the title.

1st, As to infants.

Conveyances made by them by matter of record, as fine or recovery, are voidable, and not void; and they must be avoided during their minority, or at least their infancy must be tried by the court, by their own inspection of the infant, Inst. 131 a. 380 b. Styles 472, 12 Rep. 123; and such inspection must take place during minority. Evidence is received

by the court, to assist them in the conclusion they are to form respecting the age.

And as to *common recoveries*, there is a difference whether they be suffered by the infant in person, or by attorney.

When suffered *in person*, they are voidable only by trial, viz. inspection during the period of minority. When suffered *by attorney*, the recovery may be avoided by writ of error, as well after the infant shall be adult, as during his minority.

The prominent ground of this distinction is, an infant cannot appoint an attorney.

But an effectual recovery might be suffered by an infant under a writ of *privy seal*; but such practice is now obsolete, and the place of writs of privy seal is supplied by applications to parliament for private acts, enabling infants to settle, or to enter into articles for a settlement, on their marriage.

At this day few or no attempts are made to obtain fines or recoveries from infants, since the rules of the court of Common Pleas require an affidavit by one of the commissioners that he knows the parties, and that they are of full age, and competent understanding.

All conveyances by infants, except conveyances made in performance of a condition, or in pursuance of a custom, as of gavelkind, lands, or the custom of some particular towns, &c. are voidable at least.

And it is in every day's experience, that



infants make conveyances as mortgagees or trustees under the provisions of the Act of 7 *Anne*, c. 19, intituled, "An Act to enable infants " who are seised or possessed of estates in fee, " in trust, or by way of mortgage, to make " conveyances of such estates."

That act extends to copyhold as well as to freehold lands, [order by Court of Exchequer, 26 June 1768. 7 Term Rep. 103. *Watkins's Copyhold*, 63 ;] to lands out of England as well as land in England ; therefore an infant was ordered in one instance to convey lands in a West India island, *ex parte Anderson*, 5 Ves. 240. 3 Bro. C. C. 324, and in another instance, *Evelyn v. Forster*, 8 Ves. 96, lands in *Ireland*. It also extends to infants, although they be married women, but then a fine, or, according to the circumstances, a recovery must be suffered, *Lombe v. Lombe*, Barnes 217. *ex parte Bowes*, 3 Atk. 164. *ex parte Smith*, Ambler 624. *ex parte Johnson*, 3 Atk. 559 ; and the court of Common Pleas must dispense with its rules respecting the affidavit against infancy, coverture, &c. But the act does not extend to any case in which the infant has any *beneficial* interest in the property of which he has the legal estate, as a mortgagee or trustee. *Ex parte Sergison*, 4 Ves. Jun. 147.

Nor does it extend to any case in which there are *trusts* to be performed, requiring a discretion on the part of the infant ; but in modern practice the latter rule has been relaxed ; for if all

the persons beneficially interested under the trusts to be performed are adult, and free from disabilities, and will petition the court for a conveyance to their nominee, the court will treat the infant as a mortgagee or trustee within the act.

In regard to trust estates, it is necessary that the trust should be declared by writing, or established by decree, (*ex parte Vernon*, 2 P. W. 549,) and not depend wholly on the learning of resulting trusts, or trusts by implication; and therefore an infant is not a trustee by means of a contract to sell, so as to be authorized or enabled to convey under the statute. But in *ex parte Crowther*, the only evidence of a trust of some copyhold lands purchased by the corporation of London in the name of Mr. Crowther their comptroller, was to be collected from a receipt for the consideration money in a separate instrument. The receipt imported that the money had been paid by the corporation of London, by the hands of Mr. Crowther; and on this evidence Master Steele, after some hesitation, reported the infant to be a trustee, and an order was obtained, directing the infant to convey, or rather, the lands being of copyhold tenure, to surrender. It ought however to be noticed, as highly probable, that the case passed before the court without having its particular attention drawn to it; and of course it has not the authority which would be allowed to a case fully argued and decided on the point.

It is also to be observed, that if the legal estate in the infant be entailed, the proper means for barring an entail must be observed. *Ex parte Johnson*, 3 Atk. 559. From the language, also, of 2 P. Wms. 549, it is probable, that after a decree by the court, establishing a trust against an infant under the learning of resulting trusts, or trusts by implication, the court would treat the infant as a trustee within the meaning of this act. In *Goodwyn v. Lister*, 3 P. Wms. 387, it was held, that the statute extends only to cases of express trusts, and not to such as are implied or constructive only.

In that case, the application was for a conveyance from the heir of a man who had entered into a contract for sale, and the object was to obtain a conveyance in performance of the contract; but the court would not make a decree against the infant for an immediate conveyance, *Sikes v. Lister*, 5 Vin. Abr. 541; nor can any order be made under the act, unless the petitioners have the absolute right, *ex parte Anderson*, 5 Ves. 240; and the infant will not be ordered, at least upon petition, to convey to another trustee to execute the same trusts; but perhaps he would be ordered upon a bill, praying the appointment of a new trustee, and a conveyance; and when all the creditors petition, an order may be made for a conveyance to them, or as they shall direct; *ex parte Anderson*, 5 Ves. 240. So an infant, being one of two executors, and interested as such, may be ordered to convey

after payment to the other executor, *— v. Handcock*, 17 Ves. 384. So an infant will be ordered to convey, though he be beneficially interested in the assets to be administered by the executor, *ex parte Bellamy*, 2 Cox Rep. 424. And an infant must convey, though he be a trustee for a *charity*; *Attorney General v. Pomfret*, 2 Cox 221, unless the heir be to do something besides the mere act of conveyance. And the appointment of new trustees puts an end to his duty as trustee, *ibid*.

Also, by statute 29 Geo. II. c. 31, infants, although the beneficial owners, are enabled to surrender leases for the purpose of renewal.

A distinction has always been made by sound lawyers between different acts of an infant; some were considered as void; others as voidable.

For instance, a feoffment by an infant in person was voidable only, and not void, while the feoffment of an infant made by *attorney* was considered as actually void.

The reason of this distinction was, that the infant could not appoint an attorney; in more correct terms, he could not make a deed; and an attorney, who is, as such, to make livery, or to execute a conveyance, cannot be appointed without deed.

Also a lease made by an infant, with a reservation of rent, was considered as voidable only, not as void. For it was the interest of

the infant to be able to lease his lands, that he might obtain a rent.

But a lease made by an infant, without any reservation of rent, except for the purpose of trying the title in ejectment, in other words, as a *mere form*, as it is manifestly to his prejudice, so it is considered as actually void.

On the same principle, a single bill, a bond without any penalty, by an infant for necessities, was good ; while a bond with a penalty, and conditioned for the payment of the sum laid out in necessities, was considered as bad, at least as voidable, by plea of infancy. For it would be to the prejudice of an infant to be able to subject himself to a penalty.

Every grant by an infant which necessarily required a deed, was considered as actually void, and therefore he could not grant, or transfer a rent, nor grant a reversion or remainder, or make an attorney, or as a consequence execute a conveyance by lease and release, since a deed is essential to the validity of a release.

This distinction was disregarded in *Zouch v. Parsons*, 3 Burr. 1794 ; and in that case a conveyance by an infant trustee, under the direction of his *cestui que trust*, was considered as voidable only, and not void.

This case has never been acted on in general practice ; and the decision is so objectionable in its principle, and appears so irreconcilable with the former determinations, or the policy of the

law ; and the reasons assigned in support of the decision are so sophisticated that its authority is highly questionable, and it has more than once been questioned ; and it is reasonable to suppose that it would not be followed as a precedent for decision, except in a case exactly the same in specie and in circumstances. Indeed it would be difficult to support it even to this extent. No experienced conveyancer will accept a title under the authority of this decision.

In this place it is to be observed, that if a fine be levied, or recovery suffered by an infant, and such fine or recovery be voidable only, and not void, the *deed* of an infant declaring the uses of the fine or recovery will be good so long as the fine or recovery remains in force. For as the fine or recovery is the principal, and the uses only the accessory ; or rather as the uses are to arise from the seisin of the conusee in the fine, or recoveror in the recovery, the law which supports the principal, also supports the uses as the accessory. See *Mansfield's case*, 12 Rep. 123; *Hugh Lewing's case*, 10, Rep. 42; 2 Rep. 58 a; *Ann Hungate's case*, 12 Rep. 122.

In many cases however, a court of equity will, under equitable circumstances, interpose its jurisdiction, and treat a conveyance, obtained from an infant, as subject to a trust for his benefit, and decree a reconveyance.

It is also observable, that an infant may execute an authority not coupled with any interest ; thus he may be an *attorney*.

He may also execute a *power* coupled with an interest, if his infancy be dispensed with; or if from the nature of the power it be evident that it was in the contemplation of the author of the power that it should be exercised during minority.

A power, however, given to an infant will not be considered as authorizing an exercise during his minority, except the minority be expressly dispensed with, or there be some circumstance which discloses an intention that the power may be exercised during minority. *Hearle v. Greenbank*, 3 Atk. 695.

And if coverture be expressly dispensed with, and the power be silent as to minority, the dispensation with coverture affords a conclusion against, rather than in favor of, a dispensation with the disability of minority.

When a conveyance made by an infant is actually void, the entry of the intended grantee will, in many, and indeed in most, cases, gain the fee to him, by wrong, by way of disseisin.

Of course the infant will have only a right of entry, and that right must be pursued by him or his heirs within the limited periods prescribed as bars against dormant titles.

So conveyances which are voidable may be avoided by the infant, or by his heirs.

On the other hand, a right of entry may be barred, as to all or some of the lands by release, or the title may be confirmed, in the whole or in part, by the infant when adult, or by his heir.

In some cases, as in the instance of leases reserving a rent, or the like, the title may be confirmed by acceptance of rent by the infant, after the age of majority, or by the heir, or it may be confirmed by any other act which recognizes the title of the grantee.

And a confirmation or release by the infant when adult will be binding on his heirs, or other representatives.

It is true, *an estate which is void does not admit of confirmation*. Still, however, an estate gained by disseisin is unquestionably such a title as admits of being established and rendered indefeasible, by a confirmation.

Infants are also protected from injurious bargains; since, when adult, or in the event of their death, while minors, or before agreement their heirs may disaffirm, and by disagreement annul conveyances, leases, &c. made to them while infants. 1 Inst. 380 b. *Comyns's Dig.* Infant, c. 9.

#### *As to Idiots.*

THESE persons are considered as not having any sense whatever; yet it is been said, that their grants are voidable only, and not void. But in *Thompson v. Leach*, 3 Mod. 296, 2 Vent. 198, a surrender by a lunatic was considered as actually void, and not merely voidable; and this seems most reconcileable with reason and principle; and the point must be equally appli-



cable to every species of grant by deed, as distinguished from grants by matter of record. It is said an idiot may execute a naked authority; but surely that doctrine cannot in good reason be applied to any case in which discretion is to be exercised. How can an idiot even deliver a deed as the act of the person in whose name he is to officiate?

Of the same description with idiots are persons born *deaf, dumb, and blind*, since they have not any means of receiving information, or of communicating their thoughts.

Persons who are blind, or deaf, or dumb, or who at the same time labor under two only of these infirmities, may levy fines, if it appear that notwithstanding these disabilities they are capable of comprehending the nature and consequences of a fine; and can express their meaning by writing or signs, and there are three instances of persons born deaf and dumb; *Elliott's case*, Carter 53; *Griffin v. Ferrers*, Barnes's Cases of Pract. 19; *Keys v. Bull*, id. 23, who were notwithstanding permitted to levy fines, 1 Cru. 103. Persons so circumstanced can of course make any other species of assurance.

A person deaf, dumb, and blind, cannot make a deed, or pass an estate by feoffment or demise. As to feoffment and demise, for these reasons; a feoffment or demise is to be made either in person or by attorney. When made in person, it is by a corporeal investiture of the land, by delivering over the seisin or possession

of some part of the land, or some other article in the name of seisin, and accompanying the act of livery with words declaratory of the act, or by some means referring to a charter as containing a declaration of the intent with which the livery or investiture is made; and neither of these acts can be done by a person who is deaf, dumb, and blind; for though a person so afflicted may make livery of a clod of earth, or a twig, or any other article, being a substantial object, yet, first, being dumb, he is deprived of the power of utterance, and consequently of declaring by words proceeding from his mouth, the intent and object of that act, or, in other words, the *quo animo*, it is done; secondly, being deaf, he is incapable of understanding any expression which may be addressed to him, in order to his doing some act, or making some sign to denote, either affirmatively or negatively, whether the act of livery which he has made is to have the effect of a legal and formal transfer of his estate in the lands; and thirdly, being blind, and also deaf and dumb, it is morally impossible that he should have any such idea of characters, and the power of communicating their import, as will render them intelligible to any one. That the use of characters might give him the ability to pass his estate, they must be intelligible to others as well as to himself.

And when livery of seisin is made by an attorney constituted for that purpose, the power, as being necessarily delegated by a writing

under seal, and delivered, falls within the consideration of his inability to make a deed. And a man deaf, dumb, and blind, cannot make a deed, for a deed cannot be made except on an intention; an actual, or what in law is the same, a supposed, agreement to do or omit that which is to be done or omitted, and to grant or transfer that which is to be granted or transferred. And for the reasons already stated, it is altogether impossible that a person deaf, dumb, and blind, should so far understand any proposition, or the contents of a deed, as to agree to its subject matter; for he cannot read it himself, and if it be read to him, he, as being deaf, cannot understand it; and many other reasons deducible, from the incidental circumstances of sealing and delivery, and which the judgment of the reader will readily suggest to him, when he comprehends the purpose for which these ceremonies are required to the authenticity, or the essence and perfection of a deed, might be insisted on.

### *Of Lunatics.*

LUNATICS, while they continue in a state of lunacy, are in the same predicament with idiots; but during their lucid intervals they are competent to do any act like other persons.

But a title derived through a lunatic is always to be received with great caution, because the

validity of the deed depends on extraneous evidence; and if a habit of lunacy should be established by evidence on the part of the person who wishes to impeach the title, it will be incumbent on the person claiming under the deed to prove that it was executed during a lucid interval. *Attorney General v. Parnter*, 3 Bro. C. C. 441.

And if fines are levied, or recoveries suffered, by an idiot or lunatic, and such recoveries are suffered by the idiot, &c. in person, they cannot be impeached. *Mansfield's case*, 12 Rep. 124; *Hugh Lewing's case*, 10 Rep. 42.

To the disabilities of idiots and lunatics there are some exceptions. By statute 4 Geo. II. c. 10, they are enabled to make conveyances of estates of which they are mortgagees or trustees; and under the statute of 43 Geo. III. c. 75, sales, mortgages, or leases, may be made of the freehold and leasehold estates of idiots, &c. for the purpose of payment of debts, &c.; and under the provisions of 29 Geo. II. c. 31, they are enabled to make surrenders of leases for the purpose of renewing the same.

Before these acts can be called into operative force there must be a commission of lunacy, &c. 2 Ves. jun. 583; and a person found a lunatic by the laws of a foreign state is not a lunatic within this act, 8 Ves. jun. 316; and under the provisions of 36 Geo. III. c. 90, stocks standing in the names of lunatic trustees may be transferred. In these instances, the acts are

in substance performed by the committee, though they are done in the name and on the behalf of the lunatic, &c.

*As to Married Women ; and therein of  
Husbands and Wives.*

THE maxims which belong to this division are,

1st. *Husband and wife are, for many purposes, one person.* [*Duæ animæ in carne una*, 6 Rep. 4.]

2d. *The wife is of the same condition with her husband ;* hence she becomes noble by marriage with a peer of the realm.

3d. *They cannot, at law, sue one another ; nor can they, at law, make any grant one to the other, or the like.*

4th. *Upon a joint purchase, during the coverture, either of them taketh the whole ; viz. they are seised or possessed by entireties.*

5th. *The husband is the woman's head.*

6th. *All she hath is her husband's.*

7th. *Her will ought to become his will, and to be subject unto it.*

See *Wingate's Maxims*, 308, 309, 310, 311, 312, 313, 314.

On account of the unity of the persons of husband and wife, a husband cannot grant to his wife, *Litt.* § 168, 291. 1 Inst. 112 ; nor covenant with her so as to create a legal obligation, 1 Inst. 112 a ; nor covenant with her to stand seised to uses, *ibid.* *Wing. Max.* 210 ;

and being lord of a manor he cannot make a copyhold grant to her, *Firebrass v. Penant*, 2 Wils. 254. But a copyholder may surrender to the use of his wife, 1 *Watk. Copyh.* 65. *Bunting's case*, 4 Rep. 29 b. *Wing. Max.* 210.

Nor can the wife on account of her coverture grant to her husband, 1 Inst. 187.

But a husband may devise to his wife, 1 Inst. 112 a. *Litt.* § 168. *Wing. Max.* 214. But except under a power or authority, &c. she cannot devise to her husband, ib.

And a husband may by a conveyance to uses, or upon trusts, create a use or a trust in favor of his wife, 1 Inst. 112 a.

And equity will decree performance of a contract by her husband with her for her benefit, *Moore v. Ellis*, Bunb. 205.

And a wife may, by a fine or recovery, and a declaration of the uses thereof, declare a use for her husband's benefit.

And a husband or wife may act as *attorney*, in doing an act for the other in exercise of the authority; or one may execute a power, being a mere authority, in favor of the other.

Wives may alien their estates of freehold, or of inheritance, or extinguish their titles of dower, and all other rights and interests, jointly with their husbands, by fine or recovery, or as to lands of copyhold tenure by surrender.

Their interest in chattels real, except such interest as the wife hath by the provision or

consent of the husband, by way of settlement, (Sir *Edward Turner's* case, 1 Vern. 7 ;) and also her personal chattels (except personal chattels settled for her separate use) may be aliened by her husband alone, either wholly or partially, 1 Inst. 351, or forfeited by his outlawry or attainder. The forfeiture of the husband will attach on a term which he and his wife have jointly, *Hales and Petit*, Plowd. Com. 257.

On this subject, the Abridgments of *Viner* and *Bacon*, and *Comyns's* Digest, title Barou and Feme, and Mr. *Butler's* notes on *Coke on Littleton*, *Toller's* Executors, and the treatise intitled, *Laws of Women*, are particularly deserving of attention ; and as a large proportion of the concerns of mankind respecting property depend on the transactions of husbands and wives, this subject should be thoroughly investigated. And the differences which are taken between the freehold, and chattel real property of the wife, and between her personal chattels, and her *choses in action*, should be most diligently studied.

The following is a short and general summary of this comprehensive title of the law.

As to freehold lands, held either in fee simple, in fee tail, or for life, the husband and wife are seised in right of the wife, *Polyblank v. Hawkins*, Doug. Rep. 329.

His alienation would be good as against himself ; and, from the authorities, when closely examined, it seems that he has the power to

transfer the *whole* estate of his wife, subject only, at this day, to the right of entry of the wife, or her heirs; for even when he discontinues the estate of his wife, the injury may be redressed, and the estate revested by the *entry* of the wife, or of her heirs. In the mean time however, the estate of the wife will be in the alienee of the husband; for the statute of 32 *Hen. VIII. c. 28, § 6*, did not restrain the extent of the power of alienation by the husband. It merely changed the remedy from an action to an entry. Hence the wife may be barred by the husband's fine and non-claim, 1 *Inst.* 326 a.

According to some authorities, a grant by him alone, not creating a discontinuance, will determine on his death, and unless he be entitled to be tenant by the courtesy of England, even on the death of his wife.

But there are other authorities which treat the alienation of the husband alone as voidable, and not void, so that the wife or her heirs must enter to defeat the estate which he had granted; and it is clearly law, that a lease by the husband alone, by indenture or deed-poll of the lands which he holds in right of his wife, is voidable only, and not void, and will therefore continue after the death of the husband, until entry or avoidance *by* the wife, or her heirs. *Bacon's Abr. Leases.\**

And when it is remembered, that prior to the

\* See *Doe v. Butcher*, Dougl. 50, and the notes; they seem authorities for a contrary doctrine.



statute of 32 *Hen. VIII.* c. 28, § 6, the husband might have *discontinued* the inheritance of the wife by his alienation, so as to have put her or his heirs to her remedy by action, 1 *Inst.* 326 a, the more reasonable opinion seems to be, that an estate conveyed by the husband alone will continue till defeated by the entry of the wife, or of her heirs; and there are some strong expressions in the books which favor this opinion.

To bind the wife there must, as to lands of freehold tenure, be a fine or recovery by her; except as to some leases; and these leases must be made pursuant to the statute of 32 *Hen. VIII.* c. 28, and have the various requisites prescribed by that statute.

By the custom of some cities and boroughs, as London, Norwich, &c. &c. the wife's estate may be conveyed without fine or recovery, by a bargain and sale, acknowledged and enrolled according to the custom of the city or borough.

There is an equal inability in the husband, or in the husband and wife, to defeat the wife's interest in a freehold lease by *surrender*, without some assurance by record; with the exception, that the husband and wife are, by the statute of 29 *Geo. III.* c. 31, enabled to surrender the leases of the wife for the purpose of renewal.

However, it is to be observed, that if a married woman levy a fine, as a *feme sole*, this fine will be good against the wife and her heirs, unless it should be avoided by the husband

during the coverture ; and it is agreed that he may avoid the fine for the benefit of the wife as well as of himself.

And if a lease, or other estate, granted by the husband, or by the husband and wife, be voidable only, it may be confirmed by the wife after the death of the husband, or after the death of the wife by her heirs ; or it may be confirmed by the wife during the coverture, by a fine to be levied, or recovery to be suffered, by her and her husband. A void lease cannot be confirmed.

To these general observations there is *one exception, she may convey in performance of a condition ; and for the same reason it was argued, that she might convey an estate of freehold which she had as trustee. But as the law does not take any notice of trusts, the better opinion, sanctioned by uniform practice, is, that, as to the estates of freehold, which a married woman has as trustee, no effectual conveyance can be made by her without a fine or common recovery.*

The distinction between conditions and trusts is obvious ; the one is of a legal, the other is merely of equitable, cognizance. The law takes no notice of trusts. But in conveying according to a condition, the wife is preserving the estate according to the proper state of the title. But if a farm called *A* were conveyed to her in fee, upon condition that she should convey a farm called *B*, in a particular manner, she could not, it is apprehended, make an effectual

conveyance of the farm *B* without a fine, &c. Also if husband and wife levy a fine, or suffer a common recovery, a declaration of the uses by the husband alone will bind the wife and her heirs, unless the wife disagree to these uses: *Beckwith's case*, 2 Rep. 24.

And if the husband and wife do not agree in declaring all the uses, then the uses will be good so far as the husband and wife agree, and void so far as they disagree, in declaring the uses. *Ibid.*

This subject, with its distinctions, is fully discussed in the 1st vol. of the *Practise of Conveyancing*.

And if they sell the land for money, and then levy a fine to the vendee, without declaring any uses of the fine, the fine will bind the wife, and confirm the title of the purchaser, although the sale was not at first binding on the wife. 2 Rep. 24.

In *Swanton v. Raven*, 3 Atk. 105, the husband and wife levied a fine, and the husband alone declared the uses in favor of a purchaser; a court of equity would not afford relief to the wife after an acquiescence for fifteen years from her husband's death.

Also a married woman may execute an authority or power simply collateral, without the concurrence of her husband; and she may even exercise such power or authority in his favor; 1 Inst. 112 a. b. Equity would however view a sale to a husband by a wife under an authority;

being a trust, with great suspicion, and perhaps treat it as a nullity.

She may also exercise a power coupled with an interest, if the disability of coverture be in express terms dispensed with, or if from the nature of the power it can be collected that the power is exerciseable during coverture; and if a power be given to a woman to be exercised at any time, and from time to time, notwithstanding her coverture, these words, "notwithstanding her coverture," are a dispensation with the disability of coverture; and the power may be exercised as well after as during the continuance of the coverture. *Doe v. Weller*, 7 Term Rep. 478.

In cases of copyhold lands, the surrender, and of freehold lands the conveyance, should be to such uses as she, whether covert or sole, and notwithstanding her coverture, shall appoint.

But if a power be given, which, in sound construction, is to be exercised during coverture, as by a woman, *being sole*, (Lord *Antrim v. Duke of Buckingham*, Sugden 134,) the coverture will be a limited period, within which the power may be exercised, and the existence of the coverture will be essential to the valid exercise of the power.

The opinion which prevails at present is, that a power coupled with an interest, and vested in a married woman, may be executed by her during coverture. Lord *Hardwicke*, 3 Atk. 711; refers to the case of *Beaumont v. Rich*, 3 Bro.

Parl. Cases 308, as having decided this point. He also refers to the case of *Lady Travel* ; and Mr. *Sugden*, in his valuable *Essay on Powers*, p. 134, has quoted a long list of cases in support of a like doctrine. The case of *Lady Travel* has not been found ; and the case of *Beaumont v. Rich*, instead of having decided the point, left it, as far as an opinion can be formed from the Reports, in doubt ; and all the other cases are instances of powers to lease ; and such powers are, from their nature, to be exercised during coverture ; since it is manifestly for the benefit of the married woman, and of the persons in remainder or reversion, that the property should be duly and properly tenanted. It is too much then to consider it to be clear, that a power given to a woman by way of interest is without a dispensation, in terms or by circumstances, with the disability of coverture, exerciseable with effect, while she is under coverture.

As to *rights* and *titles*, as well as to *estates*, as far as they respect interests of freehold of the wife, she cannot be bound without a fine levied, or recovery suffered, by her ; or, which is equivalent, by the decree of a court of equity.

As to copyhold lands, however, the wife may, as to any estate, or any future interest, though contingent, or right or title, be bound by a customary surrender, on which she is to be solely and secretly examined according to the custom of the manor.

A surrender, however, will not operate by way of estoppel, (*Goodtitle v. Morse*, 3 Term Rep. 365; 1 Anstr. 11,) so as to bind any interest, which, if of freehold tenure, could not be bound by *release*; as an expectancy of an heir, a contingent remainder to a person not ascertained; as the survivor of husband and wife, or a class of persons who are to answer a given description, as children of *A*, who shall survive *B*, who is still alive.

She may also, as to estates and interests, though future, be bound by a customary recovery; and such customary recovery, or other customary mode of barring entails, should be observed when the wife has an estate tail, or an interest by way of right or title to an estate tail in copyhold lands.

And according to the opinion of lord *Hardwicke*, in *Pullen v. Middleton*, (9 Mod. 483,) a fine levied or recovery suffered in the King's court at Westminster, would be an effectual alienation of the trust of a wife in customary lands, held by her and her husband for an estate in fee-simple.

But the *entail* of the trust of copyhold lands cannot, except in particular cases, be barred, without pursuing the customary mode of barring entails in the lands themselves.

When a husband and wife, in right of the wife, have a contingent interest in fee in copyhold lands, it should seem that their customary surrender will operate as an effectual release;

but when they have a contingent remainder *in* tail, it seems extremely difficult to discover any legal mode by which the title to the entail may be extinguished. The only mode which is feasible, and can be relied on, is by a decree in equity obtained on a bill for the purpose.

Before such assurances shall be acted upon decisively, the law on this subject should be closely investigated.

When a woman has a trust of freehold lands by way of separate estate, she has, so far as she is by the nature of the trust treated as a *feme sole*, the complete dominion over that estate, and may transfer the same; and her conveyance of the freehold to the tenant to the writ of entry for suffering a common recovery, will, *ceteris paribus*, support that recovery, *Burnaby v. Griffin*, 3 Ves. jun. 266.

This was a decision of *Lord Alvanley*, and it is founded in principle; and though it was contrary to the opinion of the bar, and of some gentlemen of eminence in the conveyancing branch of the profession, very little doubt can be entertained of this decision being followed as a precedent.

*As to Leases for Years, or other Chattel  
Interests.*

THE husband and wife are possessed in right of the wife, and, except as to estates or interests settled by the husband, or by the husband

and wife on their marriage, by way of provision for her, and whether such interests be legal, or as it should seem equitable, the husband alone may bind the interest of his wife by *lease*, *assignment*, or *surrender*; by reference to arbitration, and an award thereon, by forfeiture; by bankruptcy; or by judgment and execution against him. But he cannot dispose of her chattels real by will or testamentary disposition; nor bind his wife's interest by a mere charge, as an annuity, &c. 1 Inst. 351 b. or by a judgment without execution; but his contract to sell will be an equitable alienation, *Stead v. Cragh*, 9 Mod. 42. And if the wife should survive the husband, the term, so far as it shall not have been aliened or forfeited by the husband, will remain with the wife, 1 Inst. 351 a; but if the husband should survive, it will, whether legal or equitable, remain with him, *jure mariti*, and consequently without letters of administration to be obtained of her effects. *Alleyn* 15; 1 Roll. Abr. 345, l. 40.

It is observable, however, that if the wife have a possibility of a term, (*Wing. Max.* 213, pl. 13; 10 Rep. 51 a; 1 Inst. 46 b. 351 a; 9 Mod. 104,) which cannot by any means vest in the husband during coverture, the husband's release, or other disposition, will not affect her; but he and his wife together may bind this possibility by a fine, *sur concesserunt*. Nor can he alone alien a term settled for the *separate use* of the wife, or a term which is settled on



*their* marriage as a provision for her, as distinguished from a settlement by a former husband. *Sir Edward Turner's case*, 1 Vern. 7; *Witham's case*, 1 Inst. 350 b.

On the contrary, she may act on a term settled for her separate use, as if she were a *feme sole*, as far as she is made a *feme sole* by the trusts declared in her favor; and she jointly with her husband may by a fine alien a term settled for her benefit on her marriage.

Lord *Alvanley* doubted whether the husband could dispose of the *trust* of a term which he had in right of his wife; but the authorities, as far as there is any decision on the point, are in favor of the husband, with the exceptions already noticed.

Chattel interests by extent, by *elegit*, and similar interests, fall under the like consideration as terms of years, and are equally at the disposal of the husband as terms for years. 1 Inst. 351.

When a woman at her marriage has the right only to a term, the right will not survive to the husband, but belong to her representatives, 1 Inst. 351 a.

So a lease by the husband alone, when he has a term in right of his wife, will bind the wife, *Young v. Radford*, Hob. 3; 1 Inst. 46 b. *Wingate's Max.* 213, pl. 13.

The rent, if any be reserved by him, will belong to him and his executors or administrators, 1 Inst. 46 b.; and if he die in the life-time the wife, without any further disposition of the

term, the rent will belong to his representatives, and the reversion expectant on the under lease will belong to the surviving wife, *ibid.* *Wingate's Maxims*, 213, pl. 12.

Had the husband and wife joined in the lease, then the rent would have been incident to the reversion, as well after the death as during the life of the husband, and would have belonged to the wife, *ibid.* pl. 15.

Suppose the husband to mortgage the term of the wife, these distinctions arise :

1st. If the equity of redemption be reserved to *the husband and wife*, the equity would belong to them.

2d. If they joined in the mortgage, the equity of redemption would then also belong to them.

But if the husband alone make the mortgage, and reserve the equity of redemption *to himself*, then the wife will be excluded ; *sed quære.*

Also, if the husband alone assign the term, subject to a condition, and enter for the condition broken during *the coverture*, the husband will be again possessed in right of his wife as before ; and the wife being the survivor may be entitled, 1 Roll. Abridg. 340, l. 45—50.

But if the husband die before the condition is broken, his executors, &c. must enter for breach of the condition, and will hold discharged of the title of the wife. *Wingate's Maxims* 213, pl. 13.

In this case the law is different as to freehold estates, in reference to the learning of discontinuance, 1 Inst. 336 b ; Litt. sect. 632.

And if the husband alone, or the husband and wife, mortgage the whole term, and the husband take back the term to himself alone, by re-assignment, the state of the title will be altered at law, and the wife cannot, either at law or in equity, assert a title to the term, even though she should be the survivor.

When the husband regains the term by force of a condition, his old title revives, *Young v. Radford*, Hob. 3 ; while a re-assignment gives him the term at law under a new title ; and the wife cannot assert any equity to control the legal title.

These distinctions, though drawn on very mature consideration, are to be received with great caution.

Another exception is to be noticed ; the term of a wife will not vest in a husband, being *an alien*, so as to forfeit to the crown, *Theobald v. Duffy*, 9 Mod. 102, yet the crown will, it is apprehended, *be entitled* to the pernancy of the profits during the coverture. 1 Inst. 351 a.

In short, the *act of law* does not vest any real property in an alien ; and therefore an alien cannot be tenant in dower, or by the curtesy, or become possessed of a term in right of the wife. 1 Vent. 417. *Actus legis nemini facit injuriam*, is the maxim.

*As to personal Chattels and Choses in Action.*

PERSONAL chattels in the possession of the wife become the absolute property of the husband on the marriage, or as soon afterwards as the property in them is acquired, and that property is accompanied by possession. 1 Inst. 351 a.

Corn sown by the husband on the lands of the wife, whether freehold, copyhold, or chattels real, which he has in her right, will belong to the surviving husband; or if he die in her life-time, to his personal representatives.

This proposition seems to flow from the law respecting emblements.

But if the husband and wife are *joint-tenants*, or tenants by *entireties* of the lands, then the corn growing on the land at his death will belong to the survivor of the husband and wife. *Wingate's Maxims* 211, pl. 1. The rule in this instance is, *cædit solo*.

Choses in action, as legacies, money due on bond, judgment, and the like, must be sued for in the *joint names* of the husband and wife, unless the bond be given to the wife during coverture, or to the husband and wife jointly. In the excepted cases, the husband may disaffirm the contract as far as it is in favor of the wife, and bring the action in his own name. *Beavor v. Lane*, 2 Mod. 217; 4 Term Rep. 617; and cases there cited.

The case in *Levinz*, part 3, 403, *Howell v. Maine*, which assumes that the husband alone may bring an action on the bond given to his wife alone, seems to be a solitary case; and it is difficult to understand the principle on which it was decided; for how can a husband, consistently with any principle of law, disaffirm the contract, and at the same time maintain an action upon it. He could not treat a grant to his wife as a grant to himself; and there is the same reason against his treating a bond to his wife as a bond to himself. To justify the decision, the principle must be carried to the extent that the husband can by law derive a title to sue in his own name under a bond to his wife, and must agree to the bond, as the means of supporting the title in himself to the benefit of the bond. Then this case will stand on the ground of *acceptance*, or agreement, while the case of a bond to the husband and wife during coverture is sustainable, on the ground, that the husband may disagree to the bond as far as it is in favor of the wife, and accept it as far as it is a bond to himself, and may declare upon the instrument as a bond to himself alone, *Ankerstein v. Clarke*, 4 Term Rep. 616.

Even choses an action, &c. may be released by the husband alone, and a payment to him will be a good discharge. Nor is it incumbent on the husband, when he has a legal remedy for the debt, to make any settlement or provision

on the wife; but unless the money shall be released by the husband, or paid to him, or unless the right shall be changed, (as in the case of an award, ordering the money to be paid to the husband, or judgment recovered by him alone,) the interest of the husband, as husband, will determine on his death; or if his wife die in his life-time, then on her death; and if the wife survive the husband, the choses in action will belong to her, and will be sueable for by her alone.

If the husband survive the wife, then these *choses in action* will belong to her personal representative, and the husband may take them as such; but then they must be applied in a due course of administration, and consequently in discharge of the debts, if any, owing by the wife, under contracts made by her while sole.

This is universally the rule as to the legal right; but the equitable right may be varied by contract; and for this reason, if the husband make a settlement on his wife, in consideration of her portion, and the husband or wife die before the portion is reduced into possession, this agreement will give to the husband's representatives a right in equity to receive the wife's portion; *Adams v. Cole*, Cases T. Talb. 168. So also, if the wife have a separate estate in these choses in action she will be considered as a *feme sole*, as far as she is made a *feme sole* by the term or nature of the trust in her favor; and though the husband may release a chose in

action of his wife, or the money due to her may be safely paid to him, neither he, nor any person claiming under him by actual assignment, nor by operation of law, as assignees under a commission of bankrupt, can compel the payment of the wife's portion from trustees, except in the case in which the husband is a purchaser of his wife's portion, without making a settlement on his wife by way of portion for her.

This head of equitable jurisdiction is now branched into a great variety of distinctions, and the learning on the subject will be found in *Bridg. Thes.* title Baron and Feme ; Mr. *Cox's* notes to *P. Wms.* and *Fonblanque's* Treatise of Equity. On the same subject there are several important cases in the Reports of Mr. *Vesey*.

The preceding observations have been applied to chattels, &c. belonging to the wife in her own right ; but she may have chattels, &c. in her character of executrix or administratrix. These chattels, while they remain in specie, and also choses in action of the deceased, will belong to the wife if she survive ; and if she die in the life-time of her husband, to the personal representatives of the person to whom she is executrix or administratrix ; but during the coverture the husband alone may assign or surrender the term which the wife hath as executrix, &c. or may release or receive money due on choses in action of the person whom she represents.

As to *attainted persons, aliens* and *others*, who are under similar disabilities, and as to

bankrupts, &c. the more convenient arrangement will be to consider their condition, and connection with titles, in a subsequent part of the work. To discuss the subjects fully or usefully in this place, would interrupt that investigation of title which is the immediate object of this part of the work.

It is necessary only to observe in this place, that a defect may exist in the title, because it is derived under a person attainted, an alien, a bankrupt, &c.

The nature and extent of that defect will be a subject for future discussion.

These disabilities may be considered as *personal*, or in respect of the person, or of crime, or of forfeiture.

### *Of Tenants for Life.*

OTHER disabilities, or, more correctly, the want of ability, may arise from the nature and extent of the estate of the party.

The rules are *nemo potest plus juris in alium, transferre quam ipse habet. Qui non habet ille non dat.*

Therefore, if *A* be a tenant for life he cannot, at least rightfully, convey any greater interest than for his life.

Acts done under powers or authorities are governed by other rules.

He may also devest the estates in remainder or reversion by a tortious alienation, and incur a forfeiture of his estate.



*Pelham's case*, 1 Rep. 14, that a recovery suffered by a person who had an estate for life, with remainder to him in tail, after interposed estates of inheritance, was a forfeiture. The contrary, however, was held in *Smith v. Clifford*, 4 Term Rep. p. 738; but it is very questionable whether the last case will be followed.

Also a feoffment, or fine, by a tenant for life, will amount to a forfeiture of his life estate, although he has a remainder in tail or in fee, as often as there are interposed estates between the estate for life and estate of inheritance of the grantor. *Pelham's case*, 1 Rep. 14.

When tenant for life, and the owner of the first estate of inheritance, join in a feoffment, fine, or recovery, this feoffment, &c. will be a rightful assurance. It will operate merely to pass the several estates of the respective grantors, under the former title. It will not give a *new title* depending on a new seisin; 1 Inst. 302 a; *Bredon's case*, 1 Rep. 76; Bro. Abr. Descent, pl. 64; and the like doctrine extends to husband and wife, when the wife is tenant for life, and the husband is tenant in tail of the first estate in remainder; *Peck v. Channel*, Cro. Eliz. 827.

Even when a tenant for life enfeoffs a person who has a remainder, after a *mesne estate of inheritance*, this feoffment will divest the ancient seisin, and give a fee-simple, depending on a new seisin; (first resolution in *Chudleigh's*

case, 1 Rep. 140 ;) and even when tenant for life, and the owner under such remote remainder expectant on prior estates of inheritance, join in a feoffment, this feoffment will pass a fee-simple, by divesting the seisin, as it depends on the former estate.

The effect of a feoffment by tenant for life is to give a fee to his alienee. The fee, however, never was in him. For that reason his widow cannot be dowable even of the seisin acquired by the feoffment, 1 Roll. Abr. 676. In this particular there is a distinction between tenant for life on the one hand, and tenant for years, and tenant at will. On the other hand, the points are to be adduced for the sake of the distinction; for when tenant for years, or at will, makes a feoffment, and thereby passes a fee, the feoffee is by estoppel precluded from denying the title of the wife of the feoffor to be endowed. See 3 Hen. IV. 6 a ; 1 Inst. 31 b ; and Hale's note, *ibid.* *Mosely v. Taylor*, sir Wm. Jones, 317; and Bro. Abr. Disseisin, pl. 76. The distinctions are collected in the Essay on Estates, chap. Dower, p. 555.

This learning is more important, and for that reason has invited more discussion, because many titles proceed from a person who supposes himself to be tenant in tail, while in point of fact and of law he is merely tenant for life; and a title thus circumstanced, is to be considered as a defective title, until all persons

who are concerned in interest have released or confirmed the title, or are barred by the statute of limitations, or by nonclaim on a fine with proclamations. This is one of the many instances in which the title will be defective, although the deeds appear to carry on the evidence of the title with ease, or without difficulty.

The consequence of this species of disseisin is, that the former fee-simple, including the several estates derived out of the same, is changed into a right of entry, and there is a new estate under a new title. Thus, the remainder-men or reversioners, instead of having a seisin or estate, will not have any other interest than a right of entry, which eventually may be turned into a right of action, either by the statutes of limitation, or by a descent which tolls the entry, or by warranty ; and these remainder-men or reversioners, until they have restored their seisin, cannot either grant or convey to a *stranger*, or make a *will* under their ownership ; though they may bind themselves by estoppel, or may release to the *terre-tenant* ; being either the freeholder, or any person who has an estate in remainder or reversion, or may *confirm* his title ; and various other consequences will be induced, as will appear from the general learning advanced on this subject in the argument of *Goodright v. Forrester*, 1 Taunton, p. 578. Other observations will be added on this point in considering the several

species of disseisin, and the consequences following the disseisin.

And when a *tenant in tail* conveys by lease and release, bargain and sale, grant, or any other mode, not operating as a discontinuance, or as a bar, his assignee will have merely an estate to continue as long as there shall be issue inheritable to the estate tail, *Machel v. Clarke*, 2 Lord Raym. 778.

So when the estate of a person is defeasible by a condition, or determinable by a collateral limitation, the estate of his assignee will be determinable in like manner till his estate is by release, confirmation, or some other mode, discharged from the defeasible or determinable quality.

But *tenant in fee-simple* has an unlimited power of alienation, except in particular cases, referrible to the person, as *ecclesiastics seised* in right of their church, &c. And as an exception, or as seeming to be an exception, to the rule already noticed, it is to be observed, that tenant in tail, having the immediate freehold, or with the concurrence of the freeholder, may, by a common recovery, alien his estate tail in the same manner as if he were seised of the estate in fee out of which his estate tail is derived.

So that if the person who created the estate tail was seised in fee-simple, the tenant in tail may convey the fee-simple; and if the person who created the estate tail had a determinable fee,

or a fee subject to a condition, he may convey the fee, subject to the like determinable or defeasible quality. See first volume of *Practice of Conveyancing*, p. 2.

In this place also it may be observed, that if to the estate tail itself there are annexed any collateral determinations or conditions, the tenant in tail may, by a common recovery, discharge his estate from these collateral qualities. See *Benson v. Scott*, 1 Mod. 108 ; *Page v. Hayward*, 2 Salk. 570 ; *Driver v. Edgar*, Cowp. 379 ; *Gulliver v. Ashby*, 1 Burr. 1929.

Another rule flowing as a deduction from the one already noticed, is, with the exceptions which have been stated, *cessante statu primitivo cessat atque derivativus*.

Therefore, if *A* be tenant for life, and he demise for ninety-nine years, this estate, unless confirmed by the person in remainder or reversion, will determine on the death of *A*.

The like observation is applicable to a lease or any other estate granted by a person having a particular or defeasible estate. Therefore, if tenant for years grant a rent charge to *A* for life, *A* will have a chattel interest for so many years as he shall live.

So if tenant for life grant to another, and the heirs of his body, the grantee will have an estate of freehold, and not of inheritance ; and the heirs of the body will be special occupants, and not within the protection of the statute, *de donis*.

But the rule is applicable only to the determination of the original estate, by its regular and proper expiration ; for the derivative estate will not be defeated by the *surrender* or *forfeiture* of the original estate.

But when the original estate determines according to the terms or nature of its limitation, or is defeated by a condition, in consequence of the *act* of the party, the determination of the original estate will involve in it the determination of the derivative estate.

Thus, if *A* be tenant during her widowhood; her estate, and consequently the estate of her lessee, will determine by her marriage.

This is equally the case, if she be tenant for life, with a condition to defeat her estate on marriage, and she marry, and advantage is taken of the condition.

Also, if *A* be parson of a church, and lease the glebe or tithes, the estate of his lessee will be determined by his resignation, cession, or any other cause, by which he ceases to be parson, as well as by his death.

It is observable also, that when a person has several estates, and makes a lease, or grants an estate, or executes a conveyance, the lease or estate so granted will be derived out of the several estates; so that the estate granted by this lease or conveyance may cease as to one estate, and continue as to another estate. Thus *A* is tenant for life, remainder to *B* in tail, remainder to *A* in fee, and *A* leases for one

thousand years ; this lease will be derived out of the estate for life, and estate in fee ; and when *A* dies the lease will be determined in respect of the estate for life, and the lease will, in respect of the fee, commence in possession on the death of tenant in tail without issue ; but in the mean time the remainder in fee, and consequently the term for years derived out of this estate in fee, may be defeated by a common recovery suffered by tenant in tail.

And although *A* and *B* had suffered a common recovery in *A*'s life-time, the term would have been barred, so far as it depended on the remainder in fee.

So if *A* had been the owner of the estate tail, the lease would have been good as against the tenant in tail during his seisin, but voidable by the issue in tail, unless barred. And though the lease had been avoided by the issue in tail, it would have remained good as to the remainder in fee, unless or until it was barred.

So a derivative estate, as a lease, or even a conveyance, may be good as to one person, and void or voidable as to another person. Of this the instances already given may be propounded as examples.

So also if *A* being married to a woman who has a title of dower, make a lease or conveyance, such lease or conveyance is good as against him and his heirs, but is voidable as against the wife ; and if she, in respect of her dower, avoid the lease or the conveyance, she suspends

the operation of the lease or conveyance in point of enjoyment, during the continuance of her estate in dower, and not wholly defeat it.

For the lease or conveyance will continue, in point of estate, even as to the third part, or the particular lands of which the wife is endowed; and the right of possession will be revived on the determination of the estate of the wife.

These and the like points will be found particularly useful in applying the law to actual practice in considering the state of titles.

### *Of Tenants in Tail.*

IN regard to tenants in tail, there is the peculiarity, that by a common recovery duly suffered a tenant in tail may enlarge his estate tail into a fee-simple, provided the donor of the estate tail had a fee-simple. See first volume of *Practice of Conveyancing*, p. 1, and by that means give certainty of duration to an estate previously uncertain in that particular; and render absolute, and indefinite, an estate which was determinable.

This learning is of infinite importance. Occasions involving its application are of daily occurrence. It is the subject of all others of most general utility, because involved in the greatest nicety. Some of the many distinctions which most frequently demand attention in the consideration of titles may with propriety be noticed in this place.



The tracts formerly published on cross remainders, and alienations by tenants in tail, (tracts which will be re-published in the intended edition of the Essay on the Quantity of Estates,) will materially assist the study of the subject to be now discussed.

Conveyances by tenants in tail must be divided into,

1st. Conveyances which are rightful, and conveyances which are tortious or wrongful.

2dly. Conveyances which do, and conveyances which do not, bar the issue in tail, and

3dly. Conveyances which do, and conveyances which do not, bar the persons having estates in remainder, or reversion expectant on an estate tail, and conditions and collateral limitations annexed to the estate tail.

Innocent or rightful conveyances by a tenant in tail are good as against himself. In some cases they are good against his issue; in other instances they are voidable by the issue in tail. Leases for years, conveyances by lease and release, or by grant, or by bargain and sale, or by release or confirmation in enlargement of an estate, are rightful conveyances, except when a warranty is annexed to the conveyance; and a discontinuance is effected by reason of the warranty, as the means of rendering the warranty efficient.

But a lease for years, granted by tenant in tail, or a conveyance from him, by lease and

release, bargain and sale, by grant or confirmation, will determine with the estate tail, whenever that estate shall determine.

But if the estate tail become a fee-simple, then these leases and other conveyances will receive extension or confirmation by the change in the quality, or by the extension, of the estate tail into a fee-simple.

In the invaluable book on Tenures, *Littleton* supposed that a tenant in tail was, for all the purposes of alienation, merely a tenant for life; and that the grantee of tenant in tail would have merely an estate of freehold for the life of tenant in tail, and not an estate of inheritance. *Littleton*, sec. 612, 613, 650.

This is one of the very few errors to be found in that book which deservedly acquired so high a degree of reputation. This error was adopted and followed in the case of *Tooke v. Glasscock*, 1 Sand. Rep. 250.

It is rather extraordinary that the judges who decided *Tooke v. Glasscock* had not brought the real point of *Seymour's* case, (10 Rep. 95,) to their recollection. In *Seymour's* case, one of the resolutions was, that the wife of a bargainee of tenant in tail was dowable. Hence it is obvious then, that the court considered the bargainee to have an estate of inheritance, and not a mere estate of freehold. For a woman is not dowable of an estate for life or lives, though it be transmissible by special occupancy to heirs, or heirs of the body.

The profession, however, ought to rejoice at the decision in *Glasscock v. Tooke*, since it led to the discussion which took place in *Machell v. Clarke*, 2 Lord Raym. 778, and called forth the elaborate judgment pronounced by Lord Chief Justice *Holt* in that case; a case which is now the leading and prominent authority in questions of this nature.

The result is, that every conveyance by a tenant in tail, either by bargain and sale, grant or release, gives a base fee commensurate with the estate tail, *Litt.* § 618, 1 Inst. 332 a. And every lease, or other partial interest, being an estate in the land, or other subject of entail, granted by tenant in tail, and which gives an interest derived out of the estate tail, will be good against the issue in tail, or voidable by them, according to circumstances.

When tenant in tail conveys by a wrongful or tortious alienation, he does not convey by virtue of his ownership as tenant in tail, but he conveys by virtue of a power confided to him by law. His tortious alienation is termed a *discontinuance*; and this word "discontinuance" emphatically describes the effect which is produced by this species of alienation. A discontinuance is the cesser of the title under the estate tail, and the commencement of a title under a new and wrongful seisin. It causes a suspension of the title under the estate tail, and gives a new estate by force of the alienation. In short, it produces an estate depending on a

new title; discontinues the estate under the ancient title, and gives commencement to a new title; by creating a new estate in fee-simple. The consequences produced by a discontinuance will illustrate these observations.

If tenant in tail lease for his own life, or if he make a grant by deed of grant, or by lease and release, or by bargain and sale, for the life of another person, he still retains his old estate tail, and has a *reversion* in respect of that estate, 1 Inst. 332 a. b.

So when he makes a lease by virtue of a *power*, or by virtue of the enabling statute of 32 Hen. VIII. c. 28, for three lives, he still retains a reversion by force of his estate tail.

But when he discontinues, by making a lease with livery for the life of a stranger, or for three lives; or when he discontinues by making a gift, in tail by livery or by fine, he acquires a *new reversion* by force of the discontinuance. He will be seised of this reversion, as under a new title, and not under his seisin of the estate tail.

So if he take back an estate tail to himself under the discontinuance, either by means of a conveyance to uses, or by means of a conveyance and reconveyance, this will be an estate tail depending on a new title, and not the ancient estate tail.

Hence many of the decisions in the old books arising from the difference between a common recovery suffered with a single or with a double

voucher ; and hence, in part, the reason for which, in modern practice, recoveries with double voucher are preferred to recoveries with single voucher ; for when a man comes in on the voucher, in a common recovery, he is supposed to come in by virtue of all estates of which he is, or of which he and his ancestors ever were, seised ; and therefore a dormant entail will be barred by the voucher of the person entitled under that entail. But when a man comes in as tenant in a recovery, and vouches over, no estate tail will be barred, except that identical estate of which he is actually seised at the time when the recovery was suffered against him as tenant.

Hence another difference ; a recovery in which tenant in tail is vouched, and vouches over, will be a bar to all estates of which he is seised in reversion, or remainder, or which he hath in point of right or title : while a recovery suffered against tenant in tail, as *tenant to the writ of entry*, will not bar any estate tail, except the identical estate tail of which he is actually seised, and which confers the right to the immediate freehold. It will not even bar an estate tail of which he is seised in remainder expectant in a remote degree on his own estate of freehold. If he had the estate tail immediately expectant on his estate for life, then the life estate would have ceased by merger, and he would be seised of the freehold by force of his estate tail, and be competent to suffer a recovery even as tenant,

so as to bar the estate tail and remainders by his voucher as tenant.

It is also to be observed, that a *discontinuance* cannot be made by any person in respect of an estate tail, unless he be seised, in fact or in law, by force of the estate tail; nor unless the estate tail confer the right to the immediate freehold.

A person who has an estate tail in remainder or reversion, after an estate of freehold, or a right to an estate tail, cannot discontinue the tail. Litt. sect. 618; 1 Inst. 332 a. But a person who has a reversion of lands expectant on a lease for years may discontinue, 1 Inst. 332 b.

The consequence of a discontinuance, while it continues in force, is, that the issue in tail, or the reversioner or remainder-man, cannot, unless remitted, make an actual entry, or maintain an ejectment; nor can, while the discontinuance remains in operation, make any grant, transfer, or disposition by deed or will. The person who has the right must proceed by *formedon*, which is the real action, and emphatically termed the *writ of right* of those who claim under an estate tail, or a reversion or remainder expectant on an estate tail; or he must release his interest to the person who has the seisin or estate, or bind it by estoppel.

To constitute a discontinuance there must be a wrongful act, and the Abridgments and Digests which contain the head *Discontinuance*, should be consulted for the purpose of learning those distinctions by which a wrongful, may be

distinguished from a rightful, alienation by tenant in tail.

The chap. Discontinuance, in *Coke Litt.* will also be highly useful to the complete understanding of this learning; and to read the chapter on Remitter in *Coke on Littleton* will greatly conduce to enlarge the fund of useful knowledge, and to show the instances in which the mere act of law will redress the wrong; and by its operation revive the seisin under the estate tail.

To enlarge on all these niceties would require a volume instead of a few short observations.

A feoffment; a fine with or without proclamations; a common recovery, not duly suffered, as distinguished from a recovery duly suffered, and operating as a bar; and also a warranty annexed to some particular species of conveyance, are the wrongful assurances by which discontinuances may be affected.

A lease and release, and a fine as parts of the same assurance, may also create a discontinuance. *Doe ex dem. Odiarne v. Whitehead*, 2 Burr. 704. But a lease and release, as a distinct conveyance, and a subsequent fine by way of further assurance, will not cause a discontinuance. *Seymour's case*, 10 Rep. 25.

It is also worthy of notice, that when the discontinuance is effected by a particular estate, as by a lease for lives, this discontinuance may be enlarged; but unless it be enlarged, either in fee or in tail, to the same or to another:

person, the discontinuance will cease with the determination of the particular estate which was the cause of the discontinuance, though it be after the death of the tenant in tail; and the title under the estate tail will be immediately revived: *Litt.* sect. 632; 1 *Inst.* 333'a; *Gilb. Ten.* 121.

On the other hand, a discontinuance by a particular estate may be enlarged by a grant of the new reversion, *Litt.* § 629, 630, either in tail or in fee. *Ibid.*

Fines with proclamations, and common recoveries duly suffered, are the ordinary means by which the issue in tail may be barred. They may also be barred by the provisions of particular acts of parliament; as by bargain and sale under the land-tax acts, and by statutes concerning bankrupts.

They may also be barred by the lineal warranty, with assets of tenant in tail in possession, or by the collateral warranty of tenant in tail in possession, with or without assets. Formerly they might have been barred by lineal or collateral warranty, although the tenant in tail had not been the tenant in tail in possession, *i. e.* having the immediate freehold by force of the estate tail.

It is by force of the statute of 4 and 5 Ann. c. 16, *for the amendment of the law*, that tenants in tail are restrained from barring the issue in tail by collateral warranty, except when they are tenants of an estate in tail in possession; and



consequently competent to suffer a valid recovery.

The issue in tail may also be bound by leases, jointures, and other estates, &c. granted by force of a power in the deed creating the entail. They may also be bound by leases made pursuant to the provisions of the enabling statute of 32 Hen. VIII. c. 28.

In all cases of powers duly pursued, the inheritance may descend to the issue, subject to the estates and charges created under the power, and the issue will be entitled to the rents reserved by such leases, &c.

Unless the issue are bound or barred by the assurances of tenant in tail, it will be to be considered, whether the assurance be void or voidable only, as against the heirs in tail.

Most assurances are voidable only, and of course, the issue must enter, or claim, to avoid such assurances. For when the assurances are voidable only, each succeeding heir in tail, under the entail, may give confirmation to the assurance as against himself.

A title which is defective, or voidable as against the issue in tail, may also become good against all the heirs in tail by a fine with proclamations duly levied; and against them, and the persons entitled in reversion and remainder, by a common recovery, duly suffered, by the tenant in tail, or heir in tail for the time being.

If tenant in tail make a lease for years, or for lives, without being warranted by any power,

or make a settlement by lease and release, without fine or common recovery, this lease or settlement will be voidable by his issue; but if afterwards a fine be levied, with proclamations, or a common recovery be duly suffered, either by the lessor or settler, or even by the heir in tail, before he has avoided the lease or settlement, the lease or settlement will be affirmed, even although there was not any intention to give validity to the same. See *Cheney v. Hall*, Amb. Rep. 526; *Stapelton v. Stapelton*, 1 Atk. 2; and *Doe dem. Shilston v. Mead*, 3 Burr. 1703.

All these cases, and many others of the same class, proceed on the ground that the estate granted by the lease, or the estate limited by the settlement, is derived out of the estate tail; and as soon as the estate tail is discharged from the rights of the issue under the statute *de donis*, the lessee, or person claiming under the settlement, will have a good title against the issue. And, notwithstanding the rule *cessante statu primitivo, &c.* and notwithstanding a grant by a tenant in tail, by lease and release, passes only a base fee, yet this base fee may be converted into a fee-simple, by a common recovery afterwards suffered by the donee, or by the heir, when heir under the entail.

*Beaumont's case*, 9 Rep. 138, and *Baker v. Willis*, Cro. Car. 476, are cases of importance to the subject now under consideration; and when properly understood, will illustrate the

learning respecting the bar of issue under an entail.

In this instance, (for both cases arose on the same gift in different stages of the title,) the gift was to two persons, and the heirs of their bodies, and a fine with proclamations was levied by one of them; and it was declared that the fine barred the issue in tail; and yet it left to the other ancestor her full ownership.

But this ownership was, by the operation of the fine, changed from an estate tail into a base fee, descendible to the heirs general in exclusion of the heirs in tail; and yet it should seem that the donee under the entail retained the power of suffering a common recovery, and of barring the remainder or reversion expectant on the estate tail. See *Errington v. Errington*, 2 Bulstr. 42.

It was agreed that the issue might take by descent, under the rules of the common law, although they were by the operation of the fine excluded from taking *per formam doni* under the entail.

As a caution against mistake, it is to be observed, that the gift was to two persons (being husband and wife,) and the heirs of their bodies, and they took by entireties; so that they were neither joint-tenants, nor tenants in common; and neither of them could alien to the prejudice of the other of them: and yet, under the comprehensive terms of the statute of proclamations of fines, 4 Hen. VII.

c. 24, one of them might alien by fine with proclamations, so as to bar the heirs under the entail.

In examining the effect of fines with proclamations, with reference to the issue in tail, the language of the statutes of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36, must be consulted.

The rules of the common law are not of any avail, as a guide to ascertain the effect of assurances by persons claiming under gifts in tail, and levying fines with proclamations. The cases which have received the determination under these statutes are the only authorities which can be safely relied on for understanding the effect of these statutes.

*Sheppard's Touchstone*, chap. Fines; *Cruise's Essay on Fines*, chap. 10; and the *Treatise on Conveyancing*, Vol. I. p. 220, will afford to the student a general outline of the cases which have been decided under the construction of these statutes.

All grants, or *innocent conveyances* from tenant in tail, will pass estates to determine on the death of tenant in tail, and the failure of his issue inheritable under the entail.

As against the persons in remainder or reversion, assurances of this description will not produce any effect whatever.

The remainder-man or reversioner will continue in the seisin of his reversion or remainder; and on the determination of his estate tail, and consequently in the absence of a common

recovery, the person having the reversion or remainder will be entitled to enter into, and to take the possession of, the lands.

And even a lease for lives, under the enabling statute of 32 Hen. VIII. c. 28, is to be considered as derived out of the estate tail, and it will determine as soon as the estate tail shall determine.

But an estate derived under a power, in a settlement by the owner of the fee-simple, and given to tenant in tail, will, unless the contrary be stipulated, continue after the determination of the estate tail. Still, however, the remainder or reversion will be a continuing seisin or estate, subject to and expectant on the estate tail while it continues; and afterwards subject to and expectant on the particular estate granted by virtue of the power; and in reference to the estate created by virtue of the power, will be, or be of the nature of, a reversion.

And in this place it may again be noticed, that a lease for lives, granted by tenant in tail, and warranted by the statute of 32 Hen. VIII. c. 28, will not be a discontinuance, so as to divest or discontinue the estate tail, or the remainder or reversion, 1 Inst. 333 a.

On the other hand, when tenant in tail, seised of the freehold by force of the entail, does, by lease with livery of seisin, or by feoffment or fine, with or without proclamations, or common recovery, grant an estate to continue beyond his own life, this conveyance will have the effect of discontinuing the reversion or re-

mainder, and turning such reversion or remainder into a right of action; and this is a wrong which cannot be redressed merely by entry. It must be remedied either under the learning of remitter, or by the cesser of the discontinuance; or must, after the determination of the estate tail, be redressed by judgment in an action of *formedon*.

And while the remainder-man or reversioner has merely a right of action, he is precluded from all power of alienation to a stranger, except so far as he may bind his interest by estoppel; and it should seem that every estoppel, except it be for years, will, instead of benefiting the donee or grantee in the instrument, operating by way of estoppel, be beneficial to the terre-tenant or wrongful owner, and have the effect of giving confirmation and stability to his title. See *Weale v. Lower*, Pollexf. 54; 1st Vol. of *Practice of Conveyancing*, 208.

Every discontinuance is not a bar.

The estate of the remainder-man or reversioner may be converted into a mere right of action; and yet that right may ultimately be redressed by the operation of law, or by the action of the party.

The right, however, may be barred by non-claim, on a fine with proclamations, or by the statute of limitations of 21 James I. c. 20.

The more general and more important point is, that by a common recovery, duly suffered by the donee in tail, or by the heir in tail,

provided the entail ever gave a vested interest, may, by a common recovery duly suffered, and adapted to the particular circumstances of the case, bar the right under the remainder or reversion, although it has not any continuance as a seisin, or as a right.

The extent of the power of alienation by tenant in tail, &c. is a subject of frequent recurrence, and of great importance to titles. The learning forms a large and comprehensive branch in the law; and the numerous points of distinction, and the exceptions which this learning involves, will be found in *Sheppard's Touchstone*, chap. Recoveries; *Mr. Cruise's Essay on Recoveries*; and the first chapter of the *Practice of Conveyancing*; and Tracts on Alienations by Tenants in Tail.

*Of the Degrees of Ownership conferred by different Estates.*

THE degrees of ownership conferred by different estates, and such practical observations as arise with reference to the different estates, or the alienation by persons being the owners under or through the medium of these estates, will next be considered.

In the Essay on the Learning of the Merger of Estates, 3d Vol. of *Practice of Conveyancing*, p. 108, there is an examination of the *gradation of estates*, or of their relative measure or extent, on a comparison of different estates with each other. The study of this subject will be found highly interesting, and useful in practice.

*As to Tenants of Estates in Fee-simple.*

A tenant *in fee-simple* may grant any less estate, or charge his estate in any manner he thinks fit, or annex to it any conditions he pleases; so as such conditions be not repugnant to the rules of law; and so as they do not contravene the law against perpetuities.

And the owner of this estate may either transfer the entire fee, or he may divide it into portions, or particular interests; as to *A* for years, remainder to *B* for life, remainder to *C* in tail, remainder to *D* in fee, with or without charges by way of rent to other persons. The maxims are, *Cujus est dare ejus est disponere*, 2 Rep. 71. *Cui licet quod majus non debet quod minus non licere*, 4 Rep. 23.

And he may make a conveyance to uses, so as to raise uses on the seisin of his assignee; or he may covenant to stand seised to uses; or may make a bargain and sale; so as to raise uses on his own seisin.

Of the nature and qualities and extent of this estate, see *Essay on Estates*, chap. Fee-simple.

*As to Tenants of base and determinable Fees.*

THE like observations are applicable to the owners of estates of this description, with the exception, that, while the estate continues determinable, an estate derived out of this deter-



minable estate will be subject to the same collateral determination.

The rule in this instance also is *cessante statu primitivo*, &c. But when the estate shall no longer be determinable, then the estates derived out of this fee will, as far as respects such determinable quality, become absolute.

These observations are equally applicable to the tenants of those estates in fee, which are subject to a condition, *mutatis mutandis*, merely substituting the word defeasible, as more appropriate than the term determinable.

#### *As to Tenants of Conditional Fees.*

These tenants are to be distinguished from the tenants of estates in fee, subject to a condition. The law applicable to these conditional fees does not seem to be precisely defined.

As against himself and his heirs, the alienation of the tenant of this estate will be good even before issue had.

But according to the more prevailing authorities, the tenant of a conditional fee cannot alien so as to defeat the condition of the donor, unless he have issue before or after the alienation.

On this subject, a detailed discussion will be found in the chapter on conditional fees in the *Essay on the Quantity of Estates*.

At this day there cannot be a conditional fee in any property except copyhold lands, not

admitting of entails; and in such hereditaments as are of a personal nature, and not charged upon or issuing out of real estate. Of this description are annuities, not being rent-charges; annuities chargeable on the post-office duty, and the like annuities, are examples, *Earl Stafford v. Bulkley*, 1 Ves. 171.

Lord *Hardwicke* seems to have been surprised into a mistake, when he supposed that there could not have been any remainder at the common law after a gift to a man and the heirs of his body.

*As to Tenants in Tail.*

THIS is a copious head, and of the first importance in the deduction of titles: since a title is more likely to be defective, from some cause relating to estates tail, than for any other reason, and indeed for all causes whatever.

The power of alienation of tenant in tail may be considered,

1st. With reference to himself.

2dly. With reference to his issue.

3dly. With reference to those in reversion or remainder, and persons having interests by executory devise.

4thly. In reference to estoppels.

And it will be proper to sum up to the different effects of deeds, fines, recoveries, *discontinuances*, and warranties by tenant in tail.

All alienations, and all charges by a tenant in tail, will be good against himself, ex-

actly in the same manner, except as to the extent and degree of interest, as if he were seised in fee-simple; and if he should acquire the fee-simple by means of his estate tail, then as if he had, really and in truth, been seised in fee-simple.

For many purposes he is to be considered as tenant in fee-simple; since he may acquire that estate by suffering a common recovery; alone when he has the freehold; and when the freehold is in any other person, then with the concurrence of the person in whom the freehold is vested.

The right, however, of suffering a common recovery, is a privilege personal to the tenant in tail, or to the person on whom the right of entail shall for the time being have devolved as heir to the entail, or the person on whom the entail if existing would have devolved.

For all the purposes of the following observations, the issue in tail, when they become the heirs in tail, are to be considered in the same predicament, and as having the same powers as tenants in tail.

A lease, or grant by tenant in tail, will bind himself, and will continue in force till avoided, when it is voidable by the entry, or action of the issue, or till the determination of the estate tail out of which it is derived.

Some conveyances, as feoffments, fines, and also releases or confirmations with warranty, by tenants in tail, create a discontinuance.

Other assurances operate as conveyances,

and pass merely an estate or interest, derived out of the estate of tenant in tail; and consequently are determinable, and will determine when that estate shall have filled the measure of its duration.

A common recovery, when it is duly suffered, is rather a conveyance by tenant in tail, than a discontinuance; and yet it is generally treated as a discontinuance.

A recovery operates, in a proper sense, as a discontinuance only when it passes a fee-simple, without barring the issue, or, as a consequence, the reversion or remainder; as in the instance of a recovery, in which there is not any voucher over by the tenant in tail.

When a discontinuance is made, the fee-simple passes, and cannot be restored without action, or remitter.

When a conveyance is made, the estate will be good against the tenant in tail, but (unless the issue shall be barred,) by the original, or by some subsequent assurance, will be voidable by them; and unless the persons in reversion or remainder shall in like manner be barred, the conveyance, will be actually void against them, under the rule *cessante statu primitivo*, &c.

But when a discontinuance is effected, the estate of tenant in tail, and of those who had the reversion or remainder, will be turned into a right of action; and while the discontinuance remains in force, the new estate will subsist until avoided by the action of the issue in tail, or of the persons in reversion or remainder;

or until the *remitter* of the issue in tail, or of the persons in reversion or remainder, or the determination of the discontinuance.

An estate granted by a tenant in tail may at different times have different qualities, partaking of the qualities of the estate out of which it is derived.

For example, if *A*, being tenant in tail, lease for 1,000 years, *A* will have an estate for that term, determinable when the estate tail shall cease.

When therefore this tenant in tail dies without issue inheritable under the entail, and without having barred the estate tail, the term will determine. It will determine, because by the failure of the issue inheritable to the estate tail there is an end to the ownership under the estate tail.

This is equally true of a conveyance in fee by tenant in tail, either by grant, lease and release, bargain and sale, or covenant to stand seised to uses.

All such conveyances are also voidable by the issue in tail, unless their right of succession shall be barred.

But if the issue should be barred by a fine with proclamations, or bound by a warranty, or by a common recovery, the conveyance will be good as against the issue; and after a common recovery shall be duly suffered, the conveyance will be good against the issue in tail, and those in reversion and remainder.

Thus an estate, which originally was voidable,

may become indefeasible ; and an estate which originally was determinable, may eventually become absolute.

It may also, by means of a fine with proclamations, become valid against the heirs in tail. It may afterwards, by means of a common recovery, become effectual against those in remainder and reversion.

Formerly the alienation of tenant in tail by grant, &c. was considered as good only during his life. In short, the interest which passed by his conveyance was considered as determinable on his death, so that it would then *ipso facto* determine.

The language of that excellent text writer, Litt. § 612, is,

“Also, if tenant in tail grant his land to another for term of the life of the said tenant in tail, and deliver to him seisin, &c. ; and after by his deed he releaseth to the tenant and to his heirs all the right which he hath in the same land, in this case the estate of the tenant of the land is not enlarged by force of such release ; for that when the tenant had the estate in the land for term of the life of the tenant in tail, he had then all the right which tenant in tail could rightfully grant or release ; so as by this release no right passeth, inasmuch as his right was gone before.”

And in § 613 ;

“Also, if tenant in tail by his deed *grant* to another all his estate, which he hath in the tenements to him entailed, to have and to hold

all his estate to the other and to his heirs forever, and deliver to him seisin accordingly ; in this case the tenant to whom the alienation was made hath no other estate but for term of the life of tenant in tail. And so it may be well proved that tenant in tail cannot grant nor alien, nor make *any rightful estate* of freehold to another person, but for term of his own life only."

And in § 650 ;

" In the same manner it is where tenant in tail grant all his estate to another ; in this case the grantee has no estate but for term of life of the tenant in tail ; and the *reversion* of the tail is not in the tenant in tail, because he hath granted all his estate, and his right, &c. And if the tenant to whom the grant was made, make waste, the tenant in tail shall not have a writ of waste, for that no reversion is in him. But the reversion and inheritance of the tail, during the life of the tenant in tail, is *in abeyance*, that is to say, only in the remembrance, consideration, and intelligence of the law."

Lord *Coke* adopted rather than dissented from this doctrine.

But in *Seymour's* case, 10 Rep. it was determined that the bargainee of a tenant in tail had an estate of which his wife might have dower ; consequently the bargainee must have had an estate of inheritance, and not merely an estate for the life of the tenant in tail.

But even the report of *Seymour's* case is calculated to mislead, since it treats the bar-

gaineer as having had an estate descendible to his heirs, *determinable by the death of tenant in tail*.

The language of the report led to the mistake in *Took v. Glasscock*, 1 Saund. 250, in which the court held, that the bargaineer of tenant in tail has merely an estate *pur autre vie*, and that the heirs were to take as special occupants; so that at that period, viz. before the law was altered by the statute of Frauds and Perjuries, 29 Car. 2, c. 3, the bargaineer had not any devisable estate.

But in *Machell v. Clarke*, 2 Lord Raymond, 778, (a case deserving particular attention, as elucidating the law on this point, with all its numerous distinctions,) Lord *Holt* declared the law on this subject; and it was finally settled that the bargaineer of tenant in tail has an estate of inheritance, which will continue as long as the estate tail shall continue, or till it shall be avoided by those who have a right to avoid the same. *Butler's Co. Litt.* 331.

The material observations of lord *Holt*, and the distinctions which he took, were, that though there are many authorities in the point, yet the reason given in the reports of them is not clear, and therefore he would give at large the reason of his present opinion; and he observed, "it has been made a question, if tenant in tail bargains and sells, or leases, and releases, or covenants to stand seised of the lands entailed to another in fee, whether the estate conveyed by the said conveyances determines by the death of the tenant in tail, or whether it con-



“ tinues until the actual entry of the issue in “ tail.” And he held that such estate continues *until the actual entry of the issue in tail* for these reasons ;

“ 1st. Because tenant in tail himself has an estate of inheritance in him ; and before the statute *de donis*, Westm. 2, 13 Edw. I. c. 1, it was held, that such estate was a fee-simple conditional ; then the statute made no alteration as to the tenant in tail himself, but only makes provision, that the issue in tail shall not be disinherited by the alienation of his ancestors ; and by *Coke Litt.* 18 a, it appears, that a base fee may be created out of an estate tail ; where it is said, that if a gift in tail be made to a villein, and the lord enters, he hath a base fee. Then if a base fee may be created out of an estate tail, there is great reason that the bargainee, &c. of tenant in tail should have it.

“ 2dly. The tenant in tail has the whole estate in him ; and therefore there is no reason why he cannot divest himself of it by grant, bargain and sale, &c. since the power of disposition is incident to the property of every one.

“ 3dly. It is no prejudice to the issue in tail, and therefore no breach of the *statute de donis*. Indeed there are strong words in the act for restraining alienations to the prejudice of the issue in tail, where it says, *quod finis ipso jure sit nullus*, &c. ; yet the construction of the said words hath always been that the entry of the issue is tolled by such fine, and he is driven to his *formedon* ; therefore, if an act which drives

the issue in tail to his formedon will not be a breach of the statute, much less will it be a breach of the statute to drive the issue in tail to enter, to avoid a bargain and sale by his ancestor.

“As to authorities, 10 Co. 95, *Seymour's case*, is in point; where it is held, that the bargainee of tenant in tail has a descendible estate, of which his wife shall be endowed; and that a fine afterwards levied by tenant in tail barred the issue in tail, but did not enlarge the estate of the bargainee; the estate tail being before converted into a base fee by the bargain and sale. And if the fine there had enlarged the estate it would have created a *discontinuance*, and then the collateral warranty had been a bar to him in remainder.

“In 3 *Coke* 84, *in the case of fines*, the case of *Litt.* sec. 613, is put and considered; and there it is held, that the words ought not to be literally understood, but in another sense. The words of *Littleton* are, [*N. B.* the quotation is erroneous] “That if tenant in tail grants *totum statum suum* to *I. S.* and his heirs, and makes a livery of seisin to *I. S.* yet the estate of *I. S.* is determined by the death of the tenant in tail.” But this ought to be understood, that it is no discontinuance, but will drive the issue in tail to enter to avoid it. Tenant in tail of a rent or common grants it in fee, the grant does not determine by his death, but at the election

of the issue in tail; and therefore, according to the case put in the case of fines, if a warranty be annexed to the grant, and the issue in tail brings a formedon, the warranty will bar him, *Winch* 5. Tenant in tail bargains and sells his land to *I. S.* in fee; *I. S.* sells to the issue in tail, being of full age, then tenant in tail dies, and the question was, whether the issue in tail was remitted? and *Hobart* held that he was; *Hutton* and *Warburton* held the contrary. But the question supposes that the estate of *I. S.* continued after the death of the tenant in tail, *Bridgm.* 92, accord. If tenant in tail makes a lease *for years*, not warranted by 32 Hen.VIII. c. 28, the issue in tail must enter to avoid it; and if he accepts rent become due afterwards, that will make the lease good as to him, which could not be if the lease was actually determined by the death of tenant in tail. In cases of exchange, the estates exchanged must be equal in quality; and yet tenant in tail may exchange his lands with tenant in fee of other lands, and it will be a good exchange till it be avoided by the issue in tail, *Coke Litt.* 51 a. And in the said case, the tenant in tail passes a fee by the word exchange, without livery of seisin, and it does not amount to a discontinuance, *Coke Litt.* 332 a, but it passes only a base fee; and if the heir in tail will avoid it, he must wave the lands given in exchange; for if he occupies them he will be bound for his

life. For, if he had not a fee the exchange had not been good, because the estates had not been equal.

“ 2. Though tenant in tail, by bargain and sale, lease and release, or covenant to stand seised, may create a base fee, yet in this case [of *Machel v. Clarke*,] the tenant in tail did not create a base fee by his covenant to stand seised, because *an estate made by tenant in tail, which will not take effect till after his death, is void*. If tenant in tail make a *lease for years, to commence after his death*, it is void in its creation, *Dier. 279, pl. 7. ; Cro. Ja. 455, Lady Griffin v. Stanhope*.

*Objection.* He has here made himself tenant for life.

*Answer.* That will not alter his estate, unless for the sake of the remainders; as, if tenant in fee covenants to stand seised to the use of himself for life, it is void; but a covenant to stand seised to the use of himself for life, remainder to *I. S.*; or to the use of *himself in tail*, will be good for the sake of the entail, or of the remainder. But here the remainder is *ipso facto* void\*, and therefore will not make the estate for life good, which otherwise would be void also. The reason why an estate made by tenant in tail, to commence after his death, is void, is, because then *the issue has a*

\* Because it was to commence after the death of tenant in tail, and no previous estate was limited for his life.

*right paramount, per formam doni.* There is express authority in this case, 2 *Coke* 52; *Cro. Eliz.* 279; *Yelvert.* 51; *Moor* 883; 1 *Leon* 110; 1 *Anders.* 291; 3 *Leon.* 291; *Cro. Eliz.* 895, *Beddingfield's* case. Which last book seems to give the true reason, *viz.* because the estate there was to commence after the death of the tenant in tail: But an estate granted by tenant in tail, which must, or which by possibility may, commence in the life of the tenant in tail, is good. He said further, that the case of fines, (3 *Coke* 84,) supported him in maintenance of this opinion against *Littleton*; and *Hob.* 399, says that *Littleton* was confounded in himself when he held, that a grant of *totus status suus* by tenant in tail, put the tail in abeyance; all the books agree that the inheritance is out of the tenant in tail; and in the same place *Hobart* says that the law abhors abeyance; therefore the inheritance must be rather in the releasee than in abeyance.

*Objection.* 1 *Saund.* 260, *Tooke v. Glasscock*, it is held, that if tenant in tail bargains and sells his land in fee, the bargainee has an estate but for the life of tenant in tail; for a devise by him is adjudged void, because tenant *pur auter vie* cannot devise by the statute of Hen. VIII. of

The case of *Tooke v. Glasscock* is for there the tenant in tail, after the and sale, and the death of the bargainee, levied a fine to a stranger; and it is

held there, that the fine enured to the benefit of the heir of the bargainee; but that is impossible; for if tenant in tail bargains and sells to *I. S.* in fee, and thereby an estate *pur autre vie* only passes, *viz.* for the life of the tenant in tail, and that descends to the heir of the bargainee, but as special occupant, the fine levied to a stranger cannot change his estate *pur autre vie* into an estate of inheritance; for there is *no instance in the law, that a fine levied to a stranger can increase, but it may extinguish, a right*; therefore the case of *Tooke v. Glasscock* is contradictory in itself, and hath no reason to support the resolution given.

Upon the whole matter he held,

“ 1st. That if tenant in tail conveys the lands entailed by bargain and sale, lease and release, or covenant to stand seised to the use of another in fee, and dies, a base fee passes by the conveyance, and the estate continues until it be avoided by the issue in tail by entry.

“ 2dly. That if tenant in tail covenants to stand seised to the use of the covenantee for life, remainder to *I. S.* in fee, or to the use of *I. S.* for life, remainder to *I. N.* in fee, the remainder is good till avoided by the entry of the issue in tail; although tenant in tail dies before the remainder takes effect, because the estate for life takes effect immediately, and the remainder might, by possibility, have taken effect in the life of the tenant in tail.

“ 3dly. If tenant in tail leases and releases to

*I. S.* in fee, to the use of himself for life, remainder to *I. N.* in fee after his death; this remainder is good, though it is to commence after the death of the tenant in tail, because it arises out of the estate of the releasee, which estate would have been good till avoided by the entry of the issue in tail.\*

“ 4thly. That in this case, the estate being raised by the covenant to stand seised without transmutation of the possession, or any alteration of the estate made, except the remainder, which is void, [it being a covenant by tenant in tail to stand seised to the use of *himself for his own life*, with remainders over,] and therefore works no alteration of the estate tail, the recovery was good, and docked the entail, and the new uses limited upon it well arose; and therefore that the judgment of the Common Pleas ought to be affirmed.”

From the observations already offered to the reader, it will be collected, that an alienation by tenant in tail, though originally voidable, may eventually become absolute, either against his issue, or, according to the nature of the conveyance, against those in reversion or remainder.

Thus, if tenant in tail make a lease or settlement, and afterwards levy a fine with proclamations, the lease or conveyance will become good as against his issue; and if he suffer a

\* The limitation would also be good, although no estate for life were limited.

common recovery (and he may suffer a common recovery if the freehold be in him as it was in the case of *Goodright v. Mead*; *Machel v. Clarke*, 2 Lord Raym. 778; 3 Burr. p. 1703; or if he obtain the concurrence of the freeholder,) the lease or settlement will become good against those in reversion or remainder.

It is observable, however, that a common recovery of a tenant in tail will not be effectual against any persons in reversion or remainder; except those who claim under the estate out of which the entail itself was derived.

To elucidate these observations; suppose *A* to be tenant in fee-simple, and to create an estate tail with divers remainders over, with or without leaving the reversion in the settler; as the tenant in tail has an estate derived out of the fee-simple, his common recovery will enlarge his estate into a fee-simple.

But if the estate tail had been derived out of a determinable fee, or a fee subject to a condition, or out of an estate tail, never effectually barred, so as to enlarge the original estate tail into a fee-simple, a recovery by the owner of this derivative estate tail will not, in right of such derivative estate tail, have any other effect than to bar the reversion, or remainder in fee, of the person by whom the estate tail was created, and of all persons claiming under him.

But even as against the issue of the donor, unless barred, the estate gained by such common recovery will be voidable in the same



manner as the derivative estate tail itself was voidable.

On this point, see Tracts on Alienations by Tenant in Tail, and vol. I. of *Practice of Conveyancing*.

With this qualification, the operation of a common recovery by tenant in tail is to bar the estate tail, and all conditions and collateral limitations annexed to that estate, and to enlarge the same into a fee-simple.

The right, however, of suffering a common recovery is, as already noticed, a privilege personal to the donee in tail, and his heir in tail, when heir.

A recovery may be suffered by a tenant in tail, either in possession, reversion, or remainder ; and in each instance it will have the effect of converting the estate tail into a fee-simple, or rather into a fee commensurate with the estate of the person by whom the entail was created.

It may even leave intermediate estates, namely, subsequent to the estate of freehold, and prior to the estate of the tenant in tail, by whom the recovery is suffered, in the same condition as if no recovery had been suffered.

And the fee acquired by such recovery may be barred by a recovery afterwards suffered by the tenant of a prior estate tail.

And a recovery suffered by a person who has the *right of an estate* tail once vested, and which has been divested or discontinued ; and, (according to the opinion now universally adopted,) even by the heir in tail, after the estate tail has

been barred by fine, or the heirs are bound by warranty, will have the effect of completing the title as against the issue in tail, and all persons in reversion or remainder. An ample discussion on this point will be found in *Fearne's Post. Works*, p. 442.

But a person who has a *contingent interest* in tail, or an interest by way of entail in an executory state, as under an executory devise, or a springing or shifting use; cannot suffer a common recovery with effect, so as to bar either the issue in tail, or those in remainder or reversion.

Nor will a recovery by the heir apparent, or a presumptive heir within the line of entail, or by the person who may afterwards become the heir in tail, have any effect by means of a common recovery, to bar the issue in tail, or the réversioner or remainder-man.

Nor can the bargainee or feoffee, or other assignee of a tenant in tail, bar the estate tail, or the reversion or remainder, by suffering a common recovery.

Nor will the recovery of a grantee of the crown, having the ownership under an estate tail, by reason of forfeiture for treason bar the reversion or remainder expectant on the estate tail.

To these general observations there is an exception under the bankrupt laws; for a bargain and sale by commissioners of bankrupt, enrolled within six lunar months, will have precisely the same effect on the estate tail, remainders or reversions, as a fine levied, or

recovery suffered by tenant in tail would have had.

It follows, that when tenant in tail has only an estate tail in reversion or remainder, after an estate of freehold, a bargain and sale will have the like effect only as a fine.

That the bargain and sale of the commissioners may enlarge the estate tail into a fee-simple, the tenant in tail must not only have an estate tail; he must also have the immediate freehold, either distinct from or as part of his estate tail.

It is agreed, that when the bankrupt has the immediate freehold, and also a remote remainder or reversion in tail, then as he might have suffered an effectual recovery, a bargain and sale by the commissioners will have the effect of a common recovery.

So if the bargain and sale be deferred until the estate of the bankrupt confer a right to the immediate freehold, no doubt is entertained respecting the operation of the bargain and sale to pass the entire fee-simple, as a recovery suffered at that time would have done.

But if a bargain and sale be made, and it operate as a fine, doubts are entertained whether a subsequent bargain and sale, when the tenant in tail might have suffered a recovery with effect, will have the operation of a recovery.

The point also, whether a bargain and sale, under a joint commission against the father, tenant for life, with remainder to the son in tail,

will have the effect of a common recovery, is now depending for decision.

These several points are more fully discussed in a former page.

It is also to be observed, that a recovery suffered by tenant in tail will not bar any leases, charges, or encumbrances affecting the estate tail itself; (*Capel's case*, 1 Rep. 66 a.) It will however bar all conditions and collateral limitations annexed to the estate tail, and all charges which partake of the nature of collateral limitations, and also all charges derived out of the reversion or remainder.

To distinguish, with accuracy, such charges as may be, from those which may not be, so barred, is extremely difficult.

On this head, the following observations may be useful:

1st. When a gift is to *A, and the heirs of his body tenants of the manor of Dale*; or,

*To A and the heirs of his body, while a tree shall stand*; or,

*To a man and the heirs of his body, provided and upon condition that he shall marry a woman of a particular name, or a particular woman*; or,

*To a man and the heirs of his body, with a conditional limitation to shift the estate, unless he take the name or bear the arms of the testator*; in all these and the like instances a recovery duly suffered by the tenant in tail will bar the condition or collateral limitation. See *Benson*

v. *Hodson*, 1 Mod. 108; *Page v. Hayward*, 2 Salk. 570; *Driver v. Edgar*, Cowp. 379; *Gulliver v. Ashby*, Burr. 1929.

The cases which afford a doubt are of this description; viz. they give rise to a question, whether there is a charge affecting the estate tail, or whether the charge is collateral or subsequent to the estate tail.

The recovery is an acknowledged bar to the charge, when it is subsequent to the estate tail, or collateral to it; while the charge, if it encumbers the estate tail, will remain, notwithstanding the recovery.

Some cases which invite the discussion of this point, are so nicely balanced, that in the absence of decision, it is impossible to state the application of the law to these cases.

An instance of doubtful solution may be exemplified by a gift to A for his life, with remainder to such of his children as he shall appoint, and in default of appointment to his first and other sons in tail.

It is agreed that the estate tail becomes vested, and that it remains subject to the power of appointment till that power is exercised.

The difficulty is to decide whether the power, and the estates to arise under the exercise of the power, are a charge on the estate tail, or whether the power is subsequent and collateral to the estate tail.

Hence the difficulty in deciding on the effect

of a recovery by tenant in tail, as against the power.

The point depends on the question, whether the power is collateral to the estate tail, and in some degree subsequent to it; or whether it is *a charge* on the estate tail itself, and *concurrent* with the same; or, in other words, runs with the estate tail; and though it is agreed that a recovery will bar all remainders and reversions dependant on an estate tail; *Capel's case*, 1 Rep. 61 b; *Cholmley's case*, 2 Rep. 52; and all conditions subsequent, and collateral limitations annexed to the same, yet as it has been shown, it will not bar any estate prior to or derived out of the estate tail, or any charge affecting that estate.

Now, whether this power be of the former or of the latter description is not quite settled; and gentlemen, whose experience and information cannot be too highly valued, differ on this question.

Some class the power under the former description; others refer it to the latter description.

The gentlemen who support the former of these opinions contend, that the estate tail is vested, subject only to be divested by an exercise of the power: they therefore conclude that the power is subsequent, and collateral to the estate tail, and not a charge on that estate. They further urge, that this, if a charge, is no otherwise a charge than any other limitation which is to defeat the estate

tail, or than any condition which is annexed to the estate tail; and there is so much legal reasoning in these arguments, that they are unquestionably entitled to considerable weight; but the Profession are not generally convinced by this reasoning; and many gentlemen still contend, that the court would treat the power as a charge on the ownership of the estate tail as a charge or power which runs with the estate, see Ambl. 328; *Capel's case*, 1 Rep. 66 a; so as to place it beyond the power of the tenant in tail to bar the same.

Indeed, the more prevailing opinion now is, that the estate tail is charged with the power, and with the estates to arise under the execution of the power; and that the power while in *fieri* cannot be barred by the recovery of the owner of the estate tail. Estates arising under the execution of the power would certainly have priority over the estate tail, or be substituted for it; but that argument is not conclusive.

The right of taking under the power may be released, or may be barred by the fine of the persons who are the objects of the power.

From *Pells v. Brown*, Cro. Jac. 590, it is sometimes inferred that no estate which is to commence by executory devise can be barred by common recovery.

The point of that case is only, that *tenant in fee* subject to an executory devise cannot bar the executory devise by a common recovery, or by any other means.

An estate tail may be subject to an executory devise, as in the instance of a gift to *A* and the heirs of his body; and if, without providing for the failure of his issue, he should depart this life under the age of twenty-five years, then his estate to cease, and the lands to remain to *B* and the heirs of his body, or to *B* for years, for life, or in fee. A recovery suffered by *A* while tenant in tail, *viz.* before twenty-five, would bar the executory devise, so as to complete the title, although he should not attain twenty-five; for, as already noticed, it is a principle, that the recovery of a tenant in tail will bar all conditions and collateral limitations annexed to his estate tail; and these interests, by executory devise, are of that description.

In short, all conditional limitations in wills, which are to take effect in derogation or in abridgment of a prior estate tail, are either executory devises, or, if there be a devise to uses, (for such uses, are, precisely for this purpose, of the same description,) *shifting uses*.

In *Driver v. Edgar*, Cowp. 579, it was argued, that there could not be any executory devise after an estate tail. This proposition, however, is not warranted by principle, and it is contrary to the decision in *Stevens v. Stevens*, Cas. T. Talb. 228.

In short, every limitation in a will giving a future interest, which cannot operate as a remainder, and still is effectual, must of



necessity be supported under the doctrine of executory devises, or future springing uses, or shifting uses.

That a recovery may be effectual as a bar, to the extent and in the manner which has been assumed, there must be,

1st. A good tenant to the precipe or writ of entry :

2dly. The tenant in tail must vouch over the common vouchee :

3dly. In some cases he himself must be vouched.

And in investigating titles by means of abstracts, care must be taken that all these circumstances concur, before a title derived from tenant in tail is considered as a good title to the fee-simple.

*Piggott and Cruise on Recoveries ; Comyns's Digest, title Estates ; and the 1st volume of the Practice of Conveyancing, chap. 1, will afford all the information necessary for understanding the general outline of this highly useful, and at the same time intricate, head of the law.*

#### *As to Fines.*

THAT a fine by tenant in tail may be good as against his issue, it must be *with proclamations*.

The fine of a donee in tail with proclamations will bar his issue, whether he has an actual and vested estate tail, so that he is seised of

the same, or he has a contingent, future, or executory interest in tail.

And even a fine by the issue in tail, in the life-time of the ancestor, will extinguish the estate tail *quoad* the person levying the fine, and all the *descendants*; being the issue in tail of that person.

And if the entail devolve on him, or any of his issue, the fine will bar all the issue in tail, claiming under the gift in tail, although they are collateral to the person by whom the fine was levied, *M'Williams's case*, Hob. 333. *Grant's case*, 10 Rep. 50 a.

But if an heir in tail who levies a fine die, and his descendants fail, before the entail descend on him, or on his issue, a fine levied under these circumstances will not bar any of the collateral issue.

For example : If *A* be tenant in tail, and has issue *B*, *C* and *D*, and *B* in the life-time of his father levy a fine with proclamations, this fine will bar *B*, and all his issue. It will even bar all the heirs in tail, even *C* and *D*, and their issue, provided *B*, or any of his descendants inheritable under the estate tail, shall be living at the death of *A*.

But if *B* should die, and his descendants inheritable under the entail should fail in the life-time of *A*, then the fine of *B* will not have any effect as against *C* and *D*, and their issue; for in the latter case they are not.

either parties or privies to *B*, by whom the fine is levied.

But in the former case, since the right of entail devolved on his descendants, *B* or his issue must be named in deriving a title to the estate tail; and this makes *C* and *D*, and their issue, privy to *B* or his issue, and brings them within the influence and operation of the statutes of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36.

Although the entail be extinguished by a fine levied under these circumstances, the estate in the lands may descend to the issue as general heirs, *Baker v. Willis*, Cro. Car. 476. But it will descend as a determinable fee; not as an estate tail; so that the common-law heir will take in exclusion of the special heir.

And a common recovery suffered by the heir in tail, when he has fulfilled in his person the character of heir under the entail, would bar the remainders and reversions expectant on the estate tail.

These points are extremely nice, and were considered in *Beaumont's* case, 9 Rep. 138, and were reconsidered in *Baker v. Willis*, Cro. Car. 476.

But an estate tail thus extinguished may be revived by confirmation, or rather a new estate tail created.

And it should seem (for no decision warranting the conclusion has been found,) that if *A*,

being tenant in tail, convey to *B* and his heirs, and *B* were to reconvey to *A* and the heirs of his body, this would be the old and not a new estate tail. It would have been otherwise if there had been a *discontinuance*.

Under less favorable circumstances the point was examined; and Lord Chief Justice *Hobart* was of opinion there was a remitter; and *Hutton* and *Warburton* were of a contrary opinion. See *Winch* 5; 2 Lord Raymond 780, *supra*, p. 388.

A fine levied by a person who has a contingent or executory interest in tail, or merely a right to an estate tail, will have the effect to extinguish the entail; so that no interest could exist under that entail, except the fine import to be a grant for years only; and in that case it will, during the term of years, bind the estate tail when vested, and the issue by estoppel.

Such estoppel operates, in some degree, in like manner as the common-law *estoppel*.

And such extinguishment partakes of the nature of the common-law extinguishment of rights and titles; and is an estoppel against all persons claiming under the entail, through or under the person levying the fine.

It differs materially from a fine levied by the issue in tail, in the life-time of the ancestor. A fine so levied has merely the effect *quoad* the issue, to take from the estate the inheritable

and other collateral qualities annexed to it as an estate tail.

It has already been observed, that deeds of mere grant pass an estate which is voidable by the issue, but not actually void, *Machel v. Clarke*, 2 Lord Raym. 778, with the exception of a covenant by a tenant in tail to stand seised to the use of *himself*, for his own life, with remainders over; or to uses, to commence after his death, *ibid.* and *Bedingfield's case*, Cro. Eliz. 895; or a lease to commence after his death, *Lady Griffin v. Stanhope*, Cro. Jac. 455; so that the title of the issue commences before any seisin can arise under the uses, or any estate can vest under the lease, *Machell v. Clarke*, 2 Lord Raym. 778; *Bedingfield's case*, Cro. Eliz. 895.

In the excepted cases, the title of the issue will be preferred under that principle of law which avoids circuitry of action, or other remedy.

It is observable also, that *the contract* of the tenant in tail, either for the sale of the lands, or to charge the same with any encumbrance, *Ross v. Ross*, 1 Ch. Cas. 171; *Herbert v. Fream*, 2 Eq. Abr. 28, pl. 34, will not be enforced specifically against his issue, though it is a contract which was binding on the tenant in tail, and would have bound the common-law heir, if the ancestor had been seised in fee-simple.

But in some cases, a decree in equity, (1 *Fonbl.* 292, note to *Bacon's Abrid.* Agreements, A.) partakes of the nature of a judg-

ment; and if pronounced against tenant in tail, will bind him and his issue, and a decree against the first tenant in tail, *upon an adverse title*, or in ordinary suits, to which the tenant in tail is a party, will bind the tenant in tail, and his issue, and all persons in reversion or remainder, *Reynoldson v. Perkin*, Ambler 564. This is analagous to the rule of law, that a *tenant in tail may join the mise in a writ of right*. In short, in all adverse actions in the realty, he supports the rights and interests which relate to the inheritance, and defends for those in reversion or remainder, as well as for the interest of himself and of his issue.

It remains to be observed, that tenant in tail may *exchange* with tenant in fee-simple, *Machell v. Clarke*, 2 Lord Raym. 778, subject however to the right of the issue in tail to avoid the exchange.

The exchange is voidable only, and not void, as against the issue; but such exchange will be actually void against those in reversion or remainder, except it be made by some act which creates a discontinuance, or they are barred by a common recovery.

Tenant in tail, as such, has no devisable estate, nor can the estate of tenant in tail *merge* while in his tenancy; and it retains the qualities of an estate tail, *Wiscot's case*, 2 Rep. 60 b.

But in the tenancy of every other person, or even in the tenancy of the donee or heir in tail,

after the qualities of the estate tail are destroyed, this estate may, like all other particular estates, merge.

Though the contrary may be inferred from some books, it should seem that tenant in tail may *quoad* himself, and *quoad* his issue, subject to the right of entry by the issue, *surrender* his estate.

The *charges* of a tenant in tail, as annuities, and judgments and crown debts, are good against himself. But annuities, or judgments, or other like encumbrance, will not by the rules of the common law, be binding against the issue claiming under the entail,

But by the statute 33 Hen. VIII. c. 39, sec. 75, the lands of tenant in tail are charged with payment of debts due to the king, by record or *special* contract.

And by the bankrupt laws, the commissioners may, by the means already mentioned, bar the entail.

In respect to grants by tenants in tail, and also by tenants for life, it is a rule not to construe them to operate wrongfully, when by a reasonable interpretation they may operate rightfully.

Therefore if tenant in tail, or for life, grant by deed to another, even by livery of seisin, without any words marking the duration of the estate, although in an ordinary case, 1 Inst. 43 a. the grantee would be entitled to hold for his own

life, yet to avoid a wrong, and because the law prefers a less estate by right to a larger estate by wrong, the grantee will be deemed tenant for the life of the tenant in tail, or of the tenant for life. In the case of a tenant for life, it is even more advantageous to have an estate for the life of the grantor than of the grantee; since, if the grant enured to the grantee for his own life, a reversion would be left in the grantor, and the estate of the grantee would be determinable, as well by his own death as by the death of the grantor, whichever of the events should first happen. *Essay on the Quantity of Estate*, chap. Life, p. 434.

The rule, *expressio facit cessare tacitum*, will of course decide the construction, when there are express words of limitation defining the quantity of estate which is granted.

*As to Warranties.*

WARRANTIES are distinguished into,

1. Lineal :
2. Collateral :
3. Commencing by disseisin.

Warranty commencing by disseisin may be disposed of by the observation, that a warranty so created is a *fraud* ; and though *warranties are favored, while estoppels are odious in law*, yet a warranty commencing with a disseisin, (a wrong) or annexed to an estate gained by disseisin, abatement, or intrusion, with an intent to create



the warranty, is of no avail to bar persons injured by the disseisin.

But though an estate be turned to a right by disseisin, yet a warranty annexed to that estate on an alienation, or on a release, or confirmation of title by any other person than him who committed the disseisin ; or even by the disseisor, if the disseisin was without an intention to create the warranty, will be free from the objection of being a warranty commencing by disseisin, *Litt.* § 697.

And as between the parties and their heirs, the warranty is good, 1 Inst. 367 a. though it would not be of avail against those who are injured by the disseisin.

*Lineal warranty* is when the warranty devolves, and the right descends, on the same person; so that the party has the right as heir, and is also the heir within the scope of the warranty. The warranty may descend on the lineal or collateral heir, viz. son or nephew, who by possibility might have claimed the land as heir, from the person who made the warranty, 1 Inst. 370 a.

*A collateral warranty* is a warranty collateral to the title to the land, 1 Inst. 370 a; and is, when the party has a right to the land, in some other character, or under some other circumstances than those in which the warranty devolves on him; for instance, *A* tenant in tail discontinues, leaving *B* his heir, and also his issue in tail; in this instance, the warranty is lineal, because

the lien of the warranty, and the title, come through the same ancestor, in the same line of descent.

Thus, if an elder brother, tenant in tail, discontinue with warranty, and die, leaving his brother his general heir, and also the heir in tail, the warranty is lineal, because the right arises in the same line as the lien or obligation of the warranty descended.

But if a discontinuance be made by *A*, tenant in tail male, with warranty, and he die, leaving *B*, a daughter, or his brother, his heir, and such daughter or brother is entitled to the land under a *remainder* as a purchaser; or by descent from a different ancestor; in this case the warranty is collateral, because the lien of the warranty, and the title to the lands, are derived in different lines. So if a son be disseised by his father, and the father alien with warranty, and die, leaving the son his heir, this is a collateral warranty, *Litt.* § 704.

In short, no warranty is lineal unless the party who is the heir is to take after, and by descent, or *quasi* by descent, from the person who created the warranty; so that at the same time that he is heir to the land, he is *heir* to, that is, bound by, the warranty, and must name the person creating the warranty in making out his pedigree, *Litt.* § 706, and in deducing a title to the land.

*Litt.* § 705, gives the reason and the description of collateral warranty, in application to the

example in § 704, of a disseisin by a father of his son, and alienation with warranty by the father, and a descent of the warranty on the son, in these terms, "because if no such deed with warranty had been made, the son in no manner could convey the title which he has to the tenements from his father unto him, inasmuch as his father had no estate or right in the lands;" and he concludes, "Wherefore such warranty is called collateral warranty, inasmuch as he who maketh the warranty is collateral to the title of the tenements; and this is as much as to say, as he to whom the warranty descendeth could not convey to him the title which he hath in the tenements by him that made the warranty, in case that no such warranty were made."

And a *warranty may be collateral, although the blood be lineal*; and the *warranty may be lineal, albeit the blood be collateral*, 1 Inst. 376.

Thus *Littleton* in 716, observeth,

"Also, if a man hath issue, three sons, and giveth land to the eldest son, to have and to hold to him and his heirs of his body begotten, and for default of such issue the remainder to the middle son, to him and to the heirs of his body begotten, and for default of such issue of the middle son, the remainder to the youngest son, and to the heirs of his body begotten; in this case, if the eldest discontinue the tail in fee, and bind him and his heirs to warranty, and dieth without issue, this is a collateral

warranty to the middle son, and shall be a bar to demand the same land by force of the remainder; for that the remainder is his title, and his elder brother is collateral to this title, which commenceth by force of the remainder. In the same manner it is, if the middle son hath the same land by force of the remainder; because his eldest brother made no discontinuance, but died without issue of his body; and after the middle made a discontinuance, with warranty, &c. and dieth without issue, this is a collateral warranty to the youngest son. And also, in this case, if any of the said sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right, with warranty, this is a collateral warranty to that son upon whom the warranty descendeth, *Causa qua supra.*"

The learning of warranty, emphatically denominated *a curious and cunning learning*; 1 Inst. 366 a. is collected and well arranged in *Sheppard's Touchstone*; Chief Baron *Comyns's Digest*; and *Coke on Littleton*.

It should be read first in *Comyns's Digest*; secondly, in *Sheppard's Touchstone*; thirdly, in *Coke on Litt.* ch. Warranty, with Mr. *Butler's* Annotations.

The leading points are,

1st. A warranty may be *lineal as to one person, and collateral as to another person*; for instance, *A* is tenant in tail, with remainder to

*B*, his brother in tail; he discontinues with warranty, and dies, leaving *C* his issue in tail; this warranty is lineal as to *C*, and collateral as to *B*.

2dly. The same warranty may, as to the same person, be lineal as to one estate, and collateral as to another estate: as, if *A* be tenant in tail male, *remainder* to *B* his son, in tail general, and *A* discontinue, leaving *B* his son, his heir at law, this warranty is lineal as to *B*, in respect of his estate in tail male, and collateral as to his estate in tail general. Therefore if *B* die without issue male, leaving *C* his daughter, his issue in tail, the warranty is collateral as to *C*.

3dly. The same warranty may be lineal as to *one moiety* of the land, and collateral as the *other moiety*.

“ As, if (*Litt.* § 710.) the tenant in tail hath issue two daughters, and dieth, and the elder entereth into the whole, and thereof maketh a feoffment in fee with warranty, &c.; and after the elder daughter dieth without issue; in this case, the younger daughter is barred as to the one moiety, and as to the other moiety she is not barred. For as to the moiety which belongeth to the younger daughter, she is barred; because, as to this part, she cannot convey the descent by means of her elder sister; and therefore as to this moiety this is a collateral warranty. But as to the other moiety which

belongeth to her elder sister, the warranty is no bar to the younger sister, because she may convey her descent as to that moiety which belongeth to her elder sister, by the same elder sister; so as to this moiety which belongeth to the elder sister, the warranty is lineal to the younger sister."

If *A*, being tenant in tail, discontinue with warranty, leaving three children *B*, *C*, and *D*, the warranty is lineal to all the children, and will not bind the entail without assets. *C*, one of the children, releases with warranty, and dies without issue; on his death this warranty descends. It is collateral as to *B*, if heir, lineal as to *D*, if heir. If *B*, not having assets from his father, claimed in the life-time of *C*, there would be no impediment to his recovery, because at that time the warranty of *C* had not descended on him; and the warranty of *A* was lineal, and there were not any assets.

If he claimed after the death of *C*, then, as the collateral warranty had descended on him, the warranty would be an impediment to him, as the law would presume that he had had, or would have, assets from *A* by descent.

The like observation applies to the issue of *B*; and if *B* die without issue, then *D* would be heir of *C*; and as to him, the warranty of *C* would be lineal, and no bar without assets. Litt. sec. 708.

4thly. *A warranty may be a bar at one time, and not at another time.* This point is illustrated by

...some of  
...section  
...in full faith  
...the full in fee.  
...deed to the  
...his heirs to  
...in full  
...without issue  
...any re-  
...the  
...collateral  
...to the  
...respect  
...collateral  
...some  
...direct  
...the  
...the  
...is under  
...it might

...might be  
...the death of  
...the youngest  
...descent by  
...the common law,  
...warranty, was, that  
...with assets, while  
...with or without  
...the statute  
...c. 16, even collateral

warranty is not binding without assets, except in the particular case of a warranty by tenant in tail in possession, and consequently by a person who could bar the remainder by suffering a common recovery.

It is observable that a *warranty does not confer any estate* ; it does not *give any title* ; (1 Inst. 372 a.) it is merely a protection to a title ; a shield or defence as against those who are bound by the warranty, while they are bound. No positive bar to the entail is created. In the pithy language of Lord Coke (1 Inst. 372 a), " it doth not give a right, but bindeth only a " right, so long as the same " [the obligation, it is apprehended] " continueth."

On these grounds it seems to follow, that a *title depending on warranty is not a title strictly marketable*.

Besides, if it should happen that the warranty should descend on one person, and the right under the entail on another person, the title under the entail might, *cæteris paribus*, be enforced, since, when the action is brought, there does not exist any available defence, by force of the warranty, which can be pleaded by way of bar to the demand ; and in the nature of things it may happen that the warranty may descend on one person, and the right to the estate tail on another person ; for instance, if a person entitled under an estate tail should be tainted of felony or treason, and die, leaving no issue, the blood of his issue would be corrupted,



and the attainder and subsequent corruption of the inheritable blood, would, even as to lands not forfeited by the treason, interrupt the descent, and thus the issue might claim, under the estate tail, and consequently would be protected by the warranty from any bar; so that the warranty would be extinct, although the right under the estate tail existed; and hence, in continuation of the passage which has been cited, lord *Coke* observes, "if the collateral warranty be determined, removed, or defeated, the right is revived."

It may happen from other causes, as well as corruption of blood, that the warranty, though binding for a time, may cease to operate.

It is also to be observed, that no warranty will be binding unless it be annexed to an estate which is previously discontinued, or turned to a right of action, or unless a discontinuance be effected by the operation of the warranty.

A warranty will *not bind a mere right of entry*; consequently it will not bar a title under a term of years, or other chattel interest, 1 Inst. 389; since the only remedy of a termor is by entry, and ejectment which assumes an entry.

Nor will it bar a mere and naked title by force of a condition, with a clause of re-entry, or of exchange, mortmain, consent to the ravisher, or the like, nor a writ of dower, though it be an action, 1 Inst. 389. Lord *Coke* has assigned the reason of all the examples except the case

of dower, in these terms, "because that for these no action doth lye; and if no action can be brought, there can be neither voucher, writ of *warrantia carte*, nor rebutter, and they continue in such plight and essence as they were by their original creation, and by no act can be displaced or divested out of their original essence, and therefore cannot be bound by any warranty. And as to dower, the assigned reason is, "because her title of dower cannot be divested out of the original essence"; 1 Inst. 389 a.

So it is of a feoffment, *causa matrimonii prælocuti*, *ibid.*: and it may be added that the like rule applies to titles by devise, and in particular by an executory devise in derogation and abridgment of a prior fee.

All these interests may be barred by non-claim on a fine with proclamations, levied after the possession is *adverse*.

In one case dower was held to be barred by non-claim on a fine levied before the possession was adverse to the title of dower; *Menville's* case, 13 Rep. 19.

### *Of Estoppels.*

EVEN at the common law estoppels are odious, while warranties, as a species of assurance, are favored.

Estoppels do not give an estate; they do not divest any interest; they merely bind the in-

terest by conclusion, precluding the parties *as between themselves* from asserting or denying this state of title.

In consequence of the statute *de donis* no estoppels of a donee or heir in tail will be binding on the *succeeding heir in tail* merely as estoppels.

But the statutes of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36, gave to fines with proclamations, even when they were to operate by estoppel, a far more extensive operation than even the like estoppels had at the common law against *general* heirs.

Subject to this statutable exception to the prejudice of the issue, there seem to flow two distinct propositions ;

1. All assurances by or from a tenant in tail, though operative only by estoppel, will have the like operation and effect, as *against him*, as they would have had against him if they had proceeded from a tenant in fee-simple ; for he himself is in the same condition since the statute *de donis*, as if that statute had not passed.

2. No estoppel by or against a tenant in tail, or an heir of entail, will have any effect as against the next successor in tail.

Between estoppel and evidence there seems to be a wide difference ; since acts which are to operate by way of evidence, are quite distinct from acts which are to operate by way of estoppel.

Estoppels are received as conclusive, and preclude the investigation of the real merits of the title ; while evidence is merely the medium of establishing facts which do exist, or have existed.

Thus, a recital of a lease for a year, as being evidence against a grantor tenant in tail, may, it is apprehended, be evidence against all persons connected with him in privity, as the issue in tail, the persons in reversion and remainder, &c. While an estoppel, though it would preclude the grantor being tenant in tail, would not be binding merely as an estoppel against the heirs in tail. These distinctions are examined ; and the cases which prove that conveyances which are informal, as recoveries without a tenant of the freehold, are conveyances complete and binding against the tenant in tail, and pass the estate defeasibly as against the heirs in tail, although they are not valid against or binding on these heirs, for want of a tenant to the writ of entry ; and the effect of recitals by tenants in tail is examined and discussed in the *Treatise on the Practice of Conveyancing*, 2 Vol. p. 453.

It follows that the recoveror himself cannot falsify a recovery ; so that an erroneous recovery is good till reversed, and amounts to a conveyance as between the parties, when one of them has a seisin ; and as an extinguishment by estoppel, when there is merely a right of action or of entry.

And the recovery has its operation against him by estoppel and conclusion, which shall not bind the issue in tail who claim *per formam doni*, *Marquis of Winchester's* case, 3 Rep. 1.

So in *Owen v. Morgan*, cited 3 Rep. 5, the case was supposed to be the same as if the husband had had a remainder in tail expectant on an estate for life, in which case the book continues: "A common recovery had against him shall not bind, because he was not tenant of the precipe, nor seised by force of the tail; but the recovery as to the estate of the husband took its effect by estoppel and conclusion, and therewith agreeth, 12 Edw. IV. c. 14. That against a common recovery against the ancestor in tail the issue may say that the ancestor was not tenant, "*tempore brevis*;" thus, both these cases suppose the recovery to be good between the parties, and consequently they must operate as a conveyance, and the issue in tail, and those in remainder, are driven to their writ of error to avoid the recovery; and it would be highly inconvenient that the tenant in tail should continue seised contrary to his own solemn act, or that the person to whom he conveys, and who is named tenant in the proceedings towards the recovery, should be at liberty to defend himself, and consequently retain the estate, by alleging the incapacity of the tenant in tail to suffer a recovery, which will not be binding against his issue and those in remainder; and it cannot be supposed, that

if the demandant acquire aseisin, either in fact or in law, he can claim to be exempt from the uses declared of his estate.

In *Bennett and others v. Vade*, 9 Mod. 314, the chancellor treats a recovery by tenant in fee-simple as good to bind him and his heirs by estoppel, although there is not any tenant to the precipe; and adds, "the reason why there is no want of a tenant to the precipe in a recovery by tenant in fee, is this, that if such precipe is brought against a stranger who is not tenant, and he vouch the tenant of the lands, and he enters into warranty, by that he admits the stranger to be tenant of the lands, and so binds himself and his heirs by estoppel." He proceeds to observe, "But if he had been tenant in tail, this would not have *estopped his issue*, because he claims by a superior gift, *per formam doni*, and not through or by his ancestor;" and in the case before the court, he said, "These recoveries have revoked the will; and Sir *John Leigh* has by them acquired a new estate to the purpose of revoking the will, although it be an old one." In short, the recovery had the effect of passing the inheritance to the demandant; and for want of an express declaration of uses (for so the case appeared upon the facts) the use resulted. This resolution then is an admission, that in the case of a tenant in fee suffering a common recovery, without a good tenant to the precipe, the seisin passes to the demandant, and the uses arise on

his own seisin, as expressly declared, or result by operation of law.

Also, in *Duke and Smith's* case, 4 Leon. 238, it was agreed, that if he in reversion suffer a common recovery to uses, his heir cannot plead that his father had not any thing at the time of the recovery, for he is estopped to say, that his father was not tenant to the precipe; and therefore it is a good recovery against him by way of estoppel.

And in Lord *Say and Seal's* case, 10 Mod. 45, the language of the court is, that common recoveries, although there are no tenants to the precipes, are good, *by way of estoppel against the parties who suffer them*, though not against the remainder-man, stranger, &c.

Though the authorities are for the most part applied to the case of a tenant in fee, who suffers a common recovery, yet there is every reason to believe that tenant in tail is precisely in the same predicament, for this purpose, as tenant in fee; with the difference only, that in the case of a tenant in fee the recovery never can be avoided; while in the case of a tenant in tail, the recovery may be avoided by the issue in tail, or those in reversion or remainder; but the recovery will remain in force till avoided; and when the principles on which recoveries are founded are traced through all their circumstances; when we follow the just conclusion, "That the recovery would certainly estop the tenant and his heirs from alleging

any thing contrary to it;" when we also consider that the parties to the judgment of a court of competent jurisdiction are bound by it, and that if the seisin do not pass to the demandant, it must remain in the tenant, and that the tenant or his heirs cannot after judgment aver that he was not tenant, though he might in the first instance have pleaded non-tenure ; and that the vouchee cannot, after the recovery suffered, object that the recovery is inoperative ; so that the parties to the judgment can never avoid it, except for error apparent on the record, and not for an *extraneous fact*, as non-tenure, &c. ; we may satisfy ourselves that the seisin which vests in the tenant is drawn out of him by the operation of the recovery, and passes to the demandant in the recovery, and supplies a seisin to the uses, and consequently confers a title to the freehold, under which the recovery, though defective against the issue, reversioner and remainder-man, may be supported as a conveyance, fully operative against the tenant in tail.

If this opinion be well founded on the authorities, and it certainly is warranted by them as far as they go, there is more caution than necessity in considering a recovery without a good tenant to the writ of entry as absolutely void, instead of being voidable only ; and the practice of requiring, for the purpose of suffering another recovery, that the person to whom



the freehold was conveyed by the former recovery deeds should be the tenant to the new writ of entry, or join in making the tenant to that writ, is not well founded.

When this point shall be established and placed beyond a doubt, either by a decision, or by the concurrent opinion of gentlemen of the most distinguished eminence, the practice of insisting on the concurrence of the former tenant, or his representative, in future conveyances, will be relieved from a considerable difficulty.

It remains to be added, that terms of years, and other like interests, which commence in interest by estoppel, are, with the exceptions already noticed, binding on all persons who by descent, by gift, or by purchase, become seised of the estate which is to feed the estoppel.

#### *As to Tenants for Life.*

Under this division may be ranked the estates of persons who are merely tenants for their lives, by grant or devise; and also of persons who have estates for life, by operation of law, as tenants by the curtesy, and in dower, or from an estate tail changed by the impossibility of issue, into an estate tail after possibility of issue extinct; also of persons who have estates for several lives, or who have estates for the life of another person, or the lives of several other persons, and who are therefore called tenants *pur autre vie*.

There may also be estates for life, though they are determinable by marriage, or other like events, connected with life.

The learning on estates for life, and the modes and the terms by which they are granted or created, and the degrees of ownership conferred by different estates for life, are considered in the *Essay on the Quantity of Estates*, under the chapter Estates for Life, Curtesy, and Dower.

Of the circumstances which must concur, in order to the existence of a title by curtesy, or in dower, some further observations will be introduced in the progress of this work.

In this place it will be sufficient to observe, that tenant for life has only a particular estate. He may transfer that estate; or he may create any underlease to be derived out of his estate. All estates he shall grant will, as far as they are derived out of his ownership, and depend for effect on his estate, without the intervention of any power, determine when his estate shall have filled the measure of its duration.

And if the estate be determinable on some collateral event, as marriage, such event, when it happens, will induce the determination of the underlease, or derivative estate.

But by a *tortious alienation*, and which necessarily amounts to a forfeiture of his estate, a subject which will be more discussed in a subsequent page, he may convey the fee by

wrong, or tortious alienation, as by making a feoffment, &c. He may also commit a forfeiture by such feoffment, or by levying a fine, which asserts a title to the fee, or by suffering a common recovery ; except indeed he joins with the tenant in tail in suffering the recovery, under such circumstances, even though the estate be held under a remote remainder, the recovery will not, according to the case of *Smith and Clifford*, 2 T. Rep. 738, amount to a forfeiture of his estate ; but see *Pelham's case*, 1 Rep. 14 b. which is an authority for the contrary position, when the estate tail is held under a remote remainder.

He may also forfeit his estate by joining the mise in a writ of right, or by accepting a fine from another, who asserts by the fine a title to the fee.

But it is easy for a tenant for life to assist a tenant in tail in suffering a recovery, without incurring the forfeiture of his estate for life.

This may be done either by the 100,000*l.* clause, 1 Vol. of *Practice of Conveyancing*, p. 480, or by keeping a reversion, or by limiting uses, which shall give him an estate interposed between the estate of the tenant to the writ of entry, and the remainder or reversion.

An estate for life may be surrendered, or may merge ; but neither the surrender or merger will have any effect to defeat or determine any underleases granted, or charges created, by the tenant for life, prior to the

merger or surrender. Nor will a forfeiture by tenant for life, by tortious alienation, involve or prejudice the interests of his tenants, or those who have charges under him.

As in other instances, the estate for life must determine by force of its limitation, or must be defeated by a condition, in order to involve the interests of under-tenants, in the consequences of the determination of the estate of tenant for life.

Hence Lord *Coke*, 1 Inst. 233 b, has drawn these distinctions: "And it is to be observed, "that a condition in law, by force of a statute "which giveth a recovery, is in some cases "more strong than a condition in law without "a recovery. For if lessee for life make a lease "for years, and after enter into the land and "make waste, and the lessor recover in an "action of waste, he shall avoid the lease "made before the waste done. But if the "lessee for life make a lease for years, and "after enter upon him, and make a feoffment "in fee, this forfeiture shall not avoid the lease "for years. Nor, in any of the said cases a "precedent rent granted out of the land shall "be avoided. For if lessee for life grant a rent "charge, and after doth waste, and the lessor "recovereth in an action of waste, he shall hold "the land charged during the life of the tenant "for life; but if the rent were granted after "the waste done, the lessor shall avoid it.

"And the reason wherefore the lease for "years in the case aforesaid shall be avoided is,

“ because of necessity the action of waste must  
 “ be brought against the lessee for life, which  
 “ in that case must bind the lessee for years,  
 “ or else by the act of the lessee for life the  
 “ lessor should be barred to recover *locum*  
 “ *vastatum*, which the statute giveth.

“ If a man hath an office for life, which re-  
 “ quireth skill and confidence, to which office  
 “ he hath a house belonging, and chargeth the  
 “ house with a rent during his life, and after  
 “ commit a forfeiture of his office, the rent  
 “ charge shall not be avoided during his life ;  
 “ for regularly a man that taketh advantage  
 “ of a condition in law, shall take the land with  
 “ such charge as he finds it. And therefore  
 “ *Littleton* is here to be understood, that a  
 “ condition in law is as strong as a condition in  
 “ deed, as to avoid the estate or interest itself,  
 “ but not to avoid precedent charges, but in  
 “ some particular cases, as by that which hath  
 “ been said appeareth.”

In investigating a title, it frequently, and particularly in the construction of wills, is necessary, to consider whether an estate for life, an estate in tail, or in fee, has been limited.

The greater part of the difficulties which occur on this subject are considered in the *Essay on the Quantity of Estates*, chapter Estates, Fee, in Tail, and for Life ; and in reference to the important rule in *Shelley's case*, in *Fearne* on Contingent Remainders, and in the *Succinct view of the rule in Shelley's case* ; a rule

which governs so large a portion of the transactions of mankind. This rule is expressed in these terms by Mr. *Fearne*, Conting. Rem. 4th edit. 30. "Where the ancestor takes an estate of freehold, by any gift or conveyance, and in the same gift or conveyance there is a limitation, mediate or immediate, to his heirs, or heirs of his body, the word 'heirs' is a word of limitation of the estate, and not of purchase."

By Mr. Serjeant *Glynn* in *Perrin v. Blake*, MS. Reports, "In any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of the body, he takes a fee-tail; if to his heirs, a fee-simple."

And by lord *Coke*, 1 Inst. 376 b. in these terms; "Whensoever the ancestor taketh any estate of freehold, a limitation after in the same conveyance to any of his heirs, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder;" *Litt.* § 719.

If any further information be wanted on the subject of this rule, or the case is to be governed by any particular decision, recourse must be had to the Abridgments and Digests, under the title Devises, Remainders, Estates; and to the Reports, and the Indexes to the Reports.

Also it is frequently important to consider whether an estate for life is determined; whether it was duly surrendered; or whether it has been determined by merger. In many cases it will also be important to ascertain, that the estate

for life was so defeated, surrendered, merged, or determined before a given time.

This is more particularly important when the question arises, whether an ancestor was actually seised, so as to become the stock of a new succession; whether a contingent remainder has been defeated by the destruction or determination of the particular estate, before the remainder could commence in possession; or whether a recovery was duly suffered, and consequently the freehold was in the person against whom the writ of entry was brought; also, whether an estate in remainder has become an estate in possession, so as to warrant the exercise of certain powers given to tenants for life, when in possession, &c. or to confer a title by dower or by curtesy.

These points should be very attentively considered, as often as they may have any influence on the title.

In many instances also, it is essential to the title to consider and decide whether trustees have merely an estate for life, or an estate in fee. This point arose in the cases of *Bagshaw v. Spencer*, 2 Atk. 246; *Smith v. Shapland*, 1 Bro. Ch. Cas. 75; *Venables v. Morris*, 7 Term Rep. 342; *Do ed. Compere v. Hicks*, 7, Term Rep. 433; *Curtis v. Price*, 12 Ves. 89; and was much discussed in the late case of *Wykham v. Wykham*, 11 East 458, 3 Taunt. 316; 8 Ves. 395; *Jones v. Say & Sele*, 3 Bro. Ch. Cas. 458.

When trustees have the fee, all the subsequent limitations will be mere trusts, and a

common recovery duly suffered will be good in equity, without the concurrence of the trustees; but when the trustees have the legal estate of freehold for the life of *A* or of *B*, and the remainders are of the legal estate, it is impossible to suffer a valid recovery to bar the estate tail and remainders without the concurrence of the trustee as having the freehold; 1 Vol. of the *Practice of Conveyancing*, 24, 166.

In some cases also, a question arises, whether the trustee who has the freehold can, without the direction of a court of equity, assist the first tenant in tail of the legal estate, in suffering a recovery.

It is agreed that such recovery will be good at law.

The only doubt is, whether a court of equity would restrain its operation by treating the concurrence as a breach of trust; *Moody v. Walter*, 16 Ves. 283, and the parties as in the same condition as if no recovery had been suffered.

Estates for the life of the tenant himself will necessarily determine with his death, and of course no right by succession arise from his tenancy; but estates for several lives, or even for the life of a stranger, or an estate to a man for his own life, which becomes vested in another as his assignee, in other words; estates *pur autre vie*, may devolve from the tenant to certain persons as his successors.

This was formerly considered as a title in some cases by special, and in other cases by



general occupancy, a subject well illustrated by *Blackstone* in his *Commentaries*, 2 Vol. chap. 16.

The title by general occupancy has ceased ; and the estate will belong to the heirs, or heirs of the body of the tenant, if they be named as special occupants, otherwise to the executors or administrators ; as substituted in the place of general occupants. On this subject see *Essay on the Quantity of Estates*, chap. Estates for Life.

Such estates, when transmissible to heirs generally, are now devisable by a will attested by three witnesses ; and when the lands are devised, the devisee will take, as, or in the nature of, an occupant.

It is clear that if the lands are descendible to the heirs, the right of the heir cannot be defeated by a will, unless such will be attested by three witnesses.

The statute had also been applied in practice by some gentlemen, to devises of lands in which the executors, &c. took as executors for want of a special occupant.

It has always been the opinion of the writer of these observations, that though the executor might have a legal title against a devisee, for want of an attestation of the will by three witnesses, yet the executor, taking as such, must be bound in equity at least, by all the dispositions of the testator's will, and consequently the legatee will have the benefit of the

disposition in his favor in equity, if not at law ; and it should seem in equity only ; for it would be strange that the freehold should be changed by mere assent without a conveyance.

It is now decided by *Ripley v. Waterworth*, 7 Ves. 425, that the executor is a trustee for the legatee, although the will be not attested by three witnesses.

An opinion also has been sometimes given that when a feme executrix has an estate *pur autre vie*, in her character of executrix, the estate may be aliened by her and her husband without a fine.

This opinion is questionable at least ; and it is not by any means safe to act on it. The better conclusion is, that no alteration is made by the statute law in the mode of alienation : and a confident opinion is entertained, that there cannot be any alienation binding on the wife without a fine, or other assurance of record.

The rules and principles of tenure require that there should be a fine, &c. An estate of freehold cannot pass from a married woman without a fine, or some other assurance by record ; 1 *Scholes and Lefroy* 290.

So copyholds for life in trustees for a woman are frequently considered as her personal estate ; and it is contended, that she and her husband, and the argument must go the length, that the husband alone, may alien these copyholds by deed. But it should seem that unless there

be an express trust, converting the realty into personalty, a married woman has an interest in the copyhold itself by way of realty, which cannot be barred or aliened by the act of her husband, or of the husband and wife, except in the same mode in which they might have transferred a legal estate in the same tenement.

In all cases of alienation of life estates, simply and alone, the fine *sur concessit* is proper to be adopted, and it should be a fine for the life or lives.

A fine which imported to pass the fee; and even a fine *sur concessit*, amounting to a grant in fee, would be a forfeiture if the parties had the legal estate; for no alienation, by the equitable owners, will be a forfeiture of an equitable estate.

Estates for a life or lives, though limited to *heirs of the body*, are mere estates of freehold, and not of inheritance.

Therefore no dower or curtesy can arise from the seisin of an estate of this description; *Grey v. Manock*, cited 6 Term Rep. 292; *Blake v. Blake* in the Exchequer, 1786.

Nor is an estate tail created. There is merely an estate in the nature of an estate tail; a *quasi entail*; *Low v. Burron*, 3 P. Will. 262; *Grey v. Manock*, 6 Term Rep. 292.

This *quasi entail* is not within the protection of the statute *de donis*; per lord *Northington* in *Grey v. Manock*, *ibid.*

As a *quasi* entail may be created, so remainders after or expectant on a *quasi* estate tail may be limited. For this species of estate admits of limitations by way of strict settlement; as to one for life, remainder to another, as *quasi* tenant in tail, with limitations over.

Unless there be an alienation by the *quasi* tenant in tail, there will be a devolution, or *quasi* descent, to his heirs, heirs of the body, or heirs male, or heirs female of the body, according to the form of the gift.

And on failure of special heirs, when the gift is to them, the limitations over may have effect in like manner, as in the regular order and course of remainders, after an actual estate tail. See *Fearne's Executory Devises*, 386; *Low v. Burron*, 3 P. Wil. 362; *Doe v. Luxton*, 6 Term Rep. 293; *Cooper* 178.

The persons entitled under the limitations over, take by way of remainder, as special occupants, as answering a description of who should take as special occupants during the continuance of the lease for a life or lives, or the copyhold grant for a life or lives; for the doctrine extends to copyholds for lives.

As an estate for lives cannot transgress the rule against perpetuities, no limitation of an estate for lives can be too remote and void on that account; *King v. Cotton*, 2 P. Wil. 608; *Low v. Burron*, 3 P. Wil. 262.

In *Mogg v. Mogg*, 1 Merivale 654, the Court

of King's Bench considered this point to be so clear that it did not admit of argument.

1st. It is clear that a person who has an estate as *quasi* tenant for life, (*Dillon v. Dillon*, 1 Ball and Beatty 77 ; *Low v. Burron*, 3 P. Wil. 262.) or even a donee of a contingent interest by way of entail, cannot bar the limitations over. The former may convey his own estate ; and the latter may make a release, binding as against himself and his issue.

2dly. If there be a limitation to one and his heirs, and not to the heirs of his body, with a limitation over by way of executory devise, or shifting use, this limitation over cannot, it should seem, be barred by the first taker.

The donee of this estate, or owner for the time being, and being *quasi* tenant in tail of a *vested estate*, may in any case, and under any circumstances, whether he be tenant in possession, reversion or remainder, convey so as to disappoint his issue the *quasi* heirs in tail.

He may surrender the lease (*Low v. Burron*, 3 P. Wil. 362 ; *Baker v. Bayley*, 2 Vern. 225 ; *Doe v. Luxton*, or *Blake v. Blake*, Cox's Rep. 266 ; *Cooper* 178 ; 6 Term Rep. 293,) convey by lease and release, or other proper mode of grant, or by fine *sur concessit* ; but a fine is necessary only on account of coverture ; (per lord *Kenyon*, 6 Term Rep. 299;) and it has not any other effect than an act *inter vivos* (per lord *Hardwicke*) ; or he may bind the

issue by contract to sell, or article to settle; (*Wasteneys v. Chappell*, 1 Bro. Parl. Cas. 457 ;) or it should seem by will.

At first it was supposed that these limitations over by way of remainder could not be barred; *Low v. Burron*, 3 P. Wil. 362; but in *duke of Grafton v. Hanmer*, 3 P. Wil. 266, it was decided that the *quasi* remainders may be barred by the person who was the *quasi* tenant in tail in possession, though the legal estate was in trustees, and though the *quasi* tenant in tail was a *feme covert*; the alienation having been by her and her husband by fine *sur concesserunt*. And in *Doe v. Luxton*, 6 Term. Rep. 299, lord *Kenyon* observed, "I am rather inclined to think that the first taker may bar the remainders over by his will alone. He may certainly do so by any conveyance in his life-time, by livery of seisin, covenant to stand seised to uses, bargain and sale, &c.

It was in equity, and on account of the doctrine of tenant right attaching on leases obtained under renewals, that the power of barring the limitations over was allowed to the *quasi* tenant in tail.

This right of alienation is sometimes supposed to exist in analogy to the right of alienation under gifts of conditional fees.

But the analogy fails, inasmuch as the right of alienation does not in any manner depend on the birth of issue.

Thus it is clear that these limitations over may be barred by the alienation of *quasi* tenant in tail, when he has the *quasi* estate tail as the first or immediate estate; or he has the concurrence of the tenant of the prior life estate, *Forster v. Forster*, 2 Atk. 259; though such prior life interest be clothed with a trust, *Orbrey v. Bury*, 1 Ball and Beatty 53; and he may bar by surrender or conveyance, (lord *Kenyon* in *Doe v. Luxton*, 6 Term Rep. 292;) and it should seem they may be bound by articles or contract, and even by will.

Some of these propositions rest on opinion, and not on decision.

The effect of a *will* in particular is doubtful.

Lord *Kenyon* was, as already stated, of opinion, that a will was sufficient; while in *Dillon v. Dillon*, 1 Ball and Beatty 77, lord *Manners* ruled, that the will of a *quasi* tenant in tail, *who died without issue*, did not bar the limitations over; and lord *Redesdale*, in *Campbell v. Sandys*, 1 Scholes and Lefroy 295, questioned the power of alienation by will.

And though the *quasi* tenant in tail may bar his heirs or issue, even though he has an estate in remainder, or reversion expectant on the estate of a prior tenant for life, yet it is not decided that he can, unless he be the first taker, or a *quasi* tenant in tail in possession, or obtains the concurrence of the owner of the prior life interest, bar the limitation over by

way of remainder or reversion. A trust by way of chattel interest is not an impediment ; *Blake v. Luxton*, Cooper 178.

The judicial opinions, however, are in favor of his power of alienation to the exclusion of those in remainder, &c. *Doe v. Luxton*, 6 Term Rep. 292.

But if the author of this *quasi entail* should retain the reversion of an estate for lives, by creating a partial interest ; by grant of that interest only ; as in the case of a gift by a tenant for life to another, and the heirs of his body, without any further disposition ; it is, on principle, questionable whether this reversion could be defeated by the *quasi* tenant in tail.

On principle, it should seem that his interest could not be affected by any act of his under tenant ; for that is the situation in which this tenant of the *quasi* entail would stand. The equitable *quasi* tenant in tail has the like power of alienation as the *quasi* tenant in tail of a legal estate, *Blake v. Blake*, Excheq. 1786 ; 3 Cox's P. Wms. 10, n. 1 ; and 1 Cox's Rep. 266, Cooper 178.

Limitations of freehold leases, &c. are by analogy within the influence of the rule in *Shelley's* case, *ex parte Sterne*, 6 Ves. jun. 156 ; *Forster v. Forster*, 2 Atk. 256 ; and *Dillon v. Dillon*, 1 Ball and Beatty 77.

And limitations, which in reference to an estate of inheritance, would create an estate



tail, would give a corresponding interest in a freehold or copyhold for lives, so as to confer a corresponding power of alienation, *ibid.*

But all the interest held under a freehold lease for lives may pass without any words of gift to the *heirs*, *Windham v. Jekyl*, 2 Ves. sen. 681; and therefore, no words of limitation are of absolute necessity in the transfer of an estate under a lease for lives.

And it should seem that contingent remainders of a legal estate under a lease for lives, are, like other contingent remainders, liable to destruction.

For all the purposes of tenure, and alienation, and the right of voting at elections for knights of the shire, leases for lives at reserved rents, are considered as leases conferring a title to the freehold; and by the common law no recovery could be suffered of a particular farm so in lease, without the concurrence of the person in whom the freehold was vested under the lease.

But in this particular the common law is altered by the statute of 14 Geo. II. c. 20.

Even at the common law, in the case of a *manor*, and a lease of part of the demesnes of the manor for lives, a recovery suffered of the manor would have been good, so as to bar the estate tail in the demesnes, as well as the other parts of the manor, notwithstanding the demesnes were in lease, and the lessee, or the

person having his estate, did not join in making a tenant to the writ of entry ; *Johnson v. Earl of Derby*, Pigot on Recoveries 201.

This case depends on its particular circumstances. The manor is an entire thing, consisting of the demesnes and services. The reversion expectant on the lease remained parcel of the manor, and passed inclusively, by the recovery suffered of the manor.

The statute in question, after reciting that several leases had been theretofore, and were thereafter, likely to be made of honors, castles, manors, lands, tenements, and hereditaments, for one or more life or lives, under *particular rents* thereby reserved and to be reserved ; and that procuring surrenders of such freehold leases, or the tenants thereof to join in order to make tenants to the writs of entry or other writs, for suffering common recoveries, frequently occasioned great trouble, difficulty and expense to tenants in tail ; and the same could not, in many cases, be obtained by reason of the uncertainty in whom the legal estate of freehold under such leases were vested ; and also by reason of the disabilities and incapacities of such lessees, or persons claiming under them, by means whereof purchasers and family settlements were often delayed, and might be in great danger of being defeated, if some proper remedy were not provided.

The act enacts, for remedy thereof, " That all

common recoveries, suffered or to be suffered in his Majesty's court of Common Pleas at Westminster, or in any other court of Record, in the Principality of Wales, or in any of the counties palatine, or in any other court having jurisdiction of the same, of any honors, castles, manors, lands, tenements, or hereditaments, without any surrender or surrenders of such lease or leases, or without the concurrence, or any conveyance or assurance, from such lessee or lessees, or other person or persons, claiming under such lessee or lessees, in order to make good tenants to the writs of entry or other writs, whereupon such recoveries had been or should be had or suffered, should be as valid and effectual in law, to all intents and purposes whatsoever, as if such lessee or lessees, or any other person or persons claiming under him, her, or them, had conveyed, or joined in conveying, or should convey, or join in conveying, a good estate of freehold to such person or persons as had been or should become tenant or tenants to such writs of entry or other writs, whereupon such common recoveries had been or should be suffered.

And it is provided, that nothing in that act contained should extend or be construed to extend to make any common recoveries valid and effectual in law, unless the person or persons entitled to the first estate for life, or other greater estate (in case there be no such estate

for life in being) in reversion or remainder next after the expiration of such leases, had by some lawful act or means, conveyed or assured, or joined in conveying or assuring, or should by some lawful act or means convey or assure, or join in conveying or assuring, an estate for life, at the least, to such person or persons as had been or should become tenant or tenants to the writs of entry, or other writs, whereupon such common recoveries had been or should be suffered.

Sometimes, to support a title under a common recovery, it is necessary to consider whether *a surrender* by tenant for life may not be *presumed*.

Such presumption must be grounded on some fact; as possession in the person having the remainder or reversion, &c. and enjoyment without any claim, &c. 1 Vol. of *Practice of Conveyancing*, 81; for if the possession can be explained as held under a defective deed, the possession is accounted for, and the presumption rebutted.

Particular circumstances may justify a jury to form the presumption, and draw the conclusion, that a surrender has been made.

But a conveyancer, in advising on a title on behalf of a purchaser or mortgagee, cannot, except in very particular circumstances, such as possession for sixty or seventy years under the recovery, safely presume that a surrender was made.

Care must be taken in all cases which concern the operation of recoveries, titles by curtesy, dower, &c. descents, &c. not to confound estates for life with estates for years determinable on a life.

Estates of the former description are of freehold interest. Those of the latter description are strictly leasehold, and chattel-real property, *Dormer v. Parkhurst*, 3 Atk. 135; *Willes's Rep.* 327.

Estates for life may be encumbered by *judgment*, in like manner as estates in fee-simple, with the difference only which arises from the extent and duration of the several estates.

Uses may also be declared on an assignment of lands, or other real property held for a life or lives.

Annuities by way of rent-charge are frequently granted to a person and his *heirs* for a life or lives, instead of being granted for *years*, determinable with the decease of a person, or the decease of the survivor of several persons.

When such annuity is derived out of, and depends on a *freehold interest*, the annuity will, on intestacy, be transmissible, and belong to *heirs*, and not to *executors* or administrators: at least such is the opinion, entertained on mature deliberation. But every annuity granted out of a chattel interest will be a *chattel interest*, although it be limited to the grantee and his heirs for a *life or lives*.

An interest which in its nature is a chattel real cannot be rendered transmissible to heirs, *Litt.* § 740.

An estate in *special tail* may resolve itself, by failure of the issue inheritable to the entail, into an estate, which, in point of duration, will be merely for life. This estate is termed an *estate tail, after possibility of issue extinct*.

For all the purposes of alienation, title, and forfeiture, it is merely an estate for life. There are qualities which it retains, of an estate of inheritance, 1 Inst. 27 b : and a common recovery duly suffered before the failure of issue, would enlarge the estate into a fee-simple; and the estate thus enlarged, and its qualities altered, would not be abridged in consequence of a subsequent failure of issue.

As connected with estates for life, it may be observed, that women seised in special tail *ex provisione viri*, are, for some purposes, considered, with reference to their power of alienation, as tenants for life. They cannot bar the entail without the concurrence of the issue, or the person in reversion or remainder.

This subject is examined in the first volume of the *Practice of Conveyancing*, p. 20.

The restraint is confined to those cases in which the gift is by the husband, or some of his ancestors; or is by the provision of the husband, or his ancestors.

It does not extend to those cases in which the entail is created by the wife, or any of her

ancestors, or is given to her by any stranger; nor to any case in which the wife has a general estate tail, and the remainder is limited to a stranger.

In *Foster v. Pitfal*, Cro. Eliz. 2, the wife had an estate in tail general, *ex provisioni viri*, with remainder to a stranger in fee; and it was determined that this case was not within the statute. The case seems to have turned on the grounds that the remainder was limited to a stranger, and that the entail was general.

And if husband and wife be *joint-tenants* in fee, and create an estate tail, so as to bring the case within the statute, this entail will, as to one moiety (since each had the power of settling his or her moiety,) be considered as *ex provisioni viri*, but as to the other moiety, it will not.

In the same case, on a question, whether an estate in fee was within the statute of 11 Hen. VII. c. 20, it was held by all the judges that it was not; and even a woman seised in special tail may alien jointly with her husband the donor, or with the consent of the next heir in tail; or if none, the person next in reversion or remainder. Such consent of the issue in tail, or person next in reversion or remainder, must appear on record, or be enrolled; and consequently they ought to be parties to the fine or recovery by which the entail is barred, or to a deed enrolled.

The language of the statute is, "Provided

“ also, that this act extend not to any such  
 “ recovery or discontinuance to be had, where  
 “ the heirs next inheritable to the said woman,  
 “ or he or they that next after the death of  
 “ the same woman, should have estates of in-  
 “ heritance in the same manors, &c. be assent-  
 “ ing or agreeable to the said recoveries, where  
 “ the same assent or agreement is of record  
 “ or enrolled.”

*Tenant in Tail after Possibility of Issue  
 extinct.*

FOR all the purposes of alienation tenant in tail, after possibility of issue extinct, is considered only as tenant for life.

In *Lynch v. Spencer*, Cro. Eliz. 513, the tenant in tail, whose issue had in her life-time levied a fine with proclamations, and thus taken from the estate tail its descendible qualities, was, by some accountable mistake, considered as tenant, after possibility of issue extinct.

But in a case of this description, the tenant in tail retains the right of alienating the fee-simple by common recovery. See *Beaumont's case*, 9 Rep. 138; and *Baker and Willis*, Cro. Car. 476. And on the principle established by Mr. *Fearne's* opinion, in his posthumous works, p. 442, it should seem that a common recovery suffered by the heir in tail, after the death of the ancestor, would bar any reversions or remainders expectant on the estate tail.



In Sir *George Brown's* case, 3 Rep. 50, the wife was tenant in tail, *ex provisione viri*. The heir in tail having also the reversion in fee, levied a fine with proclamations, and the wife afterwards aliened so as to commit a forfeiture under the statute of 11 Hen. VII. c. 20; and it was held, that the right of entry for the forfeiture was in the *reversioner*; the conusee of the fine levied by the issue in tail by virtue of the reversion, and not of the entail; for it was admitted that the estate tail was barred by the fine, and that the issue, being by his fine disabled to enter, the right of entry devolved on the person having the reversion under the heir in tail, in right of his reversion.

Tenants in tail of the gift of the crown, for services performed, are, in respect of their power of alienation, while the reversion is retained by the crown, on the same footing with tenants for life, except that they do not forfeit by claiming the fee, &c.

The reversion of the crown puts it beyond their power to divest the remainder or reversion, or the estate tail.

So under several acts of parliament, for instance, the acts rewarding the duke of *Martborough*, the duke of *Wellington*, lord *Chatham*; and also under settlements made by acts of parliament of the estates of some noble families; the tenants in tail are, for the purposes of ownership, in the same condition with tenants for life,

UNDER TENANTS IN TAIL AFTER, &c. 451  
except so far as they may by force of the acts  
have powers of leasing and of jointuring.

And they are, in equity, when they pay off  
encumbrances treated as tenants for life, namely  
as presumable encumbrancers, in the place of  
these creditors whose encumbrances they have  
discharged, *Countess of Shrewsbury v. Earl of  
Shrewsbury*, 1 Ves. jun. 227.

The points on alienation by tenant for life,  
which are collected in a former part of this work,  
should be reconsidered in this place.

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END OF VOLUME THE FIRST.

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